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The Extra Annotations following this volume should invariably be examined. They give every citation of the cases reported in this volume of E.R.C. in the decisions of this country and Canada, also in the more important English decisions, indicating which citation the exact point involved and the disposition made by the Court. An additional feature is the analysis and citation of these cases in the leading text books and Annotated Reports.

English Ruling Cases

ARRANGED, ANNOTATED AND EDITED

BY

ROBERT CAMPBELL, M. A.

OF LINCOLN'S INN

ASSISTED BY OTHER MEMBERS OF THE BAR

WITH AMERICAN NOTES

BY

LEONARD A. JONES, A.B., L.L.B. (HARV.)

VOL. XXI.

PAYMENT—PURCHASER FOR VALUE

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RULING CASES.

PAYMENT.

[And see "APPROPRIATION OF PAYMENT," 3 R. C. 329 *et seq.*]

No. 1. — TOMS *v.* WILSON.

(Q. B. 1862, EX. CH. 1863.)

RULE.

UNDER an ordinary obligation to pay money, the debtor is not entitled to wait for a demand; but, where he is bound by the express terms of an instrument in writing to pay "immediately on demand," the debtor is allowed a reasonable opportunity for complying with the demand.

Toms *v.* Wilson and Another.

32 L. J. Q. B. 33-38; 382-384 (s. c. 4 Best & Smith, 442, 455; 10 Jur. (N. S.) 201; 8 L. T. 799).

*Covenant to pay Money secured "Immediately on Demand." — Reason- [33]
able Time for Payment.*

By a bill of sale, the grantor covenanted to pay the sum secured immediately upon demand in writing signed by or on behalf of the grantees being given to him or left at his last known place of abode; and if the grantor did not "immediately upon such demand" pay the money, the grantees were authorised to enter and seize the goods comprised in the bill of sale; and until default in payment on such written demand the grantor was to remain in possession of them. A written demand, signed by their attorneys on behalf of the grantees, "We hereby demand of you the immediate payment of," &c., was given by the attorneys to a sheriff's officer, who was authorised to receive the money: but he simply handed the document to the grantor, and then seized the goods: — *Held*, that the grantor was entitled to a reasonable time to get the money, and seek the grantees, or some one whom he knew to be authorised to receive it.

First count, for breaking and entering the dwelling of the plaintiff, and taking divers goods of the plaintiff.

Second count, a similar count as to the plaintiff's garden.

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Third count, for the conversion of the plaintiff's goods.

Fourth count, for the detainer of the same.

First plea, as to the breaking and entering the plaintiff's dwelling-house and taking the plaintiff's goods, a justification under a deed, set out at length, made between the plaintiff of the one part, and the defendants of the other, of which the following are the material parts. — This indenture, made the 23rd of January, 1860, between William Toms, of Somersham, in the county of Huntingdon, cattle-food manufacturer, of the one part, and William Pettitt Wilson and Joseph Pentelow, both of Somersham aforesaid, and co-partners as grocers, drapers, and general shopkeepers, of the other part. Whereas the said W. P. Wilson and J. Pentelow, as such co-partners as aforesaid, have required payment by the said W. Toms of the sum of £200 which is due from the said W. Toms to the said W. P. Wilson and J. Pentelow, as such co-partners as aforesaid; and the said W. Toms being unable without inconvenience to make such payment, it has been proposed and agreed that he should enter into the covenant and make the assignment of his household goods and effects to the said W. P. Wilson and J. Pentelow, as such co-partners as aforesaid, for securing the payment of the said sum of £200 and interest thereon in manner hereafter expressed. Now this indenture witnesseth, that in consideration of the premises, the said W. Toms, for himself, his heirs, executors, and administrators, doth hereby covenant with the said W. P. Wilson and J. Pentelow, their executors and administrators, that he, the said W. Toms, his heirs, executors, or administrators, will immediately upon demand thereof in writing signed by or on behalf of the said W. P. Wilson and J. Pentelow, or the survivor of them, or the executors, administrators, or assigns of such survivor, being delivered to or left for him or them at or affixed to any part of his, their, or either of their usual or last known place or places of abode in England, pay to the said W. P. Wilson and J. Pentelow, or the survivor of them, or the executors, administrators, or assigns of such survivor, the principal sum of £200 sterling, with interest thereon at the rate of £5 per cent per annum, to be calculated from the day of the date of these presents; and that in the mean time, and until such payment of principal money shall be made, he, the said W. Toms, his executors and administrators, will pay to the said W. P. Wilson and J. Pentelow, or the survivor of them, or the executors, administrators, or assigns of

No. 1. — *Toms v. Wilson*, 32 L. J. Q. B. 33, 34.

such survivor, interest for the said sum of £200, or for so much thereof as shall for the time being remain unpaid, at the rate of £5 per cent per annum, by equal half-yearly payments on the 23rd of July and the 23rd of January in every year, without any deduction. And this indenture further witnesseth, that, for the consideration aforesaid, the said W. Toms doth hereby grant and assign unto the said W. P. Wilson and J. Pentelow all the household furniture, plate, linen, and china, and other articles and effects of domestic or *household use of or to which [* 34] the said W. Toms is beneficially possessed or entitled for any vested, contingent, or possible estate or interest, and all the estate and interest of the said W. Toms therein and thereto (except from the grant and assignment hereby made the necessary wearing apparel of the said W. Toms and of his family, and all leasehold estates and terms of years of or to which the said W. Toms is possessed or entitled), to hold, receive, and take the premises hereby granted and assigned unto the said W. P. Wilson and J. Pentelow, their executors, administrators, and assigns. (Then followed an appointment, by Toms, of Wilson and Pentelow, their executors, &c. his attorneys, to assign any of his goods and for other purposes to carry out the deed as to the premises therein.) Provided always, and it is hereby declared and agreed, that, notwithstanding anything hereinbefore contained, these presents are upon this express condition, that if and when the said W. Toms, his heirs, executors, and administrators, shall pay or cause to be paid unto the said W. P. Wilson and J. Pentelow, or the survivor of them, or the executors, administrators, or assigns of such survivor, the said principal sum of £200 and interest, or so much thereof as for the time being shall be due and owing upon the security of these presents, upon demand in writing thereof signed by or on behalf of the said W. P. Wilson and J. Pentelow, or the survivor of them, or the executors, administrators, or assigns of such survivor, or without demand, then and in such case the grant and assignment hereinbefore contained, and these presents and everything herein contained, shall cease, determine, and be utterly void to all intents and purposes whatsoever. Provided always, and it is hereby declared and agreed, that if the said W. Toms, his heirs, executors, or administrators, do not immediately upon demand thereof in writing by or on behalf of the said W. P. Wilson and J. Pentelow, or the survivor of them, or the

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executors or administrators of such survivor, being delivered to the said W. Toms, his executors or administrators, or left for him or them at or affixed to any part of his, their, or either of their usual or last known place or places of abode in England, pay all the principal and interest moneys for the time being owing on the security of these presents, then or at any time or times thereafter it shall and may be lawful to and for the said W. P. Wilson and J. Pentelow, or the survivor of them, or the executors, administrators, or assigns of such survivor, to take possession of and get in all the estate and premises comprised in these presents, or in any assignment to be made of the future property and effects of the said W. Toms, in pursuance of the power and authority hereinbefore contained for that purpose, or any part thereof, and to sell the same, or any part thereof, by public auction or private contract, upon such conditions and in such manner as the said W. P. Wilson and J. Pentelow, or the survivor of them, or the executors, administrators, or assigns of such survivor, shall think fit, or otherwise to realise and convert the same into money. (Then followed a further power of sale, and a clause that the receipts of Wilson and Pentelow, &c., should be a good discharge to purchasers, and an "irrevocable licence" from Toms to Wilson and Pentelow, their executors, &c., after default in payment of principal and interest, in person, or by any deputy, and with or without others whom they may command, to enter, and if necessary to break into the dwelling-house, &c., for the time being belonging to or occupied by Toms in which any property comprised in the present security or any other assignment shall be, or shall reasonably be supposed to be.) Provided always, and it is hereby expressly declared and agreed, that notwithstanding anything hereinbefore contained, until default shall be made in payment of such principal and interest money upon such written demand as aforesaid, the said W. Toms, his executors, &c., may possess, use, and enjoy all the estate, effects, and premises expressed to be included in or affected by this security without disturbance by Wilson and Pentelow, &c. Averment, that the recital contained in the deed is true, and the facts and matters in the deed mentioned are truly stated and recited: and that at the time of the execution of the deed, the plaintiff was beneficially possessed of and entitled to household furniture, plate, linen, china, and other articles of domestic or household use; and that after the execu-

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tion of the deed by the plaintiff, in the daytime, to wit, at half-past two o'clock in the afternoon of the 11th of * March, [* 35] 1861, the defendants, in pursuance of the deed, caused to be delivered to the plaintiff at his then place of abode in England a certain demand in writing, signed on behalf of the defendants by their agents in that behalf duly authorised, whereby the defendants demanded of the plaintiff the immediate payment by the plaintiff to the defendants of the said sum of £200 which then remained due and owing by the plaintiff to the defendants on the security of the deed, and the plaintiff did not immediately upon the said demand pay the principal sum of £200; and the defendants, after the demand and default, peaceably entered the dwelling-house of the plaintiff and took the said goods being then therein — *quæ sunt eadem*, &c.

Second plea, as to the third and last counts, that after the said demand, and after the default by the plaintiff, and after a reasonable time had elapsed, the said principal sum still remaining unpaid, the defendants sold and disposed of the goods. Third plea, a traverse of the plaintiff's property in the goods. Fourth, not guilty, and a traverse of the detainer. Fifth, leave and licence.

Replication — joining issue on the pleas, and a new assignment, that the defendants took other goods not comprised in the deed.

Plea to the new assignment, "not guilty."

At the trial, before WIGHTMAN, J., at the Huntingdon Summer Assizes, 1862, it appeared that the plaintiff and the defendants, all living at Somersham, in Huntingdonshire, had executed the bill of sale, as alleged in the first plea, on the 23rd of January, 1860; and on the 11th of March, the £200 being still unpaid, pursuant to instructions given by the defendants, their attorneys, Messrs. Fisher & Ginn, of St. Ives, drew the following notice and (having signed it) delivered it to one John Jacob, a sheriff's officer, to serve upon the plaintiff:

"To William Toms, of Somersham, in the county of Huntingdon, cattle-feed manufacturer: As attorneys and agents for and on behalf of William Pettitt Wilson and Joseph Pentelow, both of Somersham, in the county of Huntingdon, co-partners as grocers, drapers, and general shopkeepers, we hereby demand of you the immediate payment of the principal money or sum of £200 now due and owing from you to the said W. P. Wilson and J. Pentelow, under and by virtue of a certain indenture or bill of sale,

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bearing date on or about the 23rd of January, 1860, and made between you, the said W. Toms, of the one part, and the said W. P. Wilson and J. Pentelow of the other part, together with interest on the said principal money from the date of the said indenture, after the rate of £5 per cent per annum. Dated this 11th day of March, 1861."

Jacob went to the plaintiff's house, at Somersham, about half-past two P. M. of the same day, and (as he swore) served the plaintiff with a copy of this demand, saying it was "as to the bill of sale of Wilson & Pentelow" (the defendants), and the plaintiff replied that he might do his worst. The plaintiff, however, swore that he never had a copy of the demand, and that he went to Wilson, one of the defendants, and asked for twenty-four hours' time to go to London to get the money, which he refused. The bailiffs in the mean time seized the goods on the premises in the course of an hour or an hour and a half; and when the plaintiff returned home, there was a man in possession. On the 19th and 20th of March, the goods were sold by public auction, and realised about £140 net. Jacob was authorised to receive the money, but he did not communicate that fact to the plaintiff.

The only question left to the jury was whether there had been a demand in writing served on the plaintiff; and the jury having answered it in the affirmative, a verdict was entered for the plaintiff for £15, being the value of goods seized and admitted not to have been included in the bill of sale: and a verdict was entered for the defendants as to the residue, leave being reserved to the plaintiff to move to increase the damages by such sum as an arbitrator should award, if the Court should be of opinion that there was no sufficient demand, or default after demand.

A rule *nisi* having been obtained accordingly, and argued before the Court of Queen's Bench, the following judgments were delivered:—

[36] COCKBURN, Ch. J. — We are all of opinion that this rule should be absolute. By the terms of the bill of sale, the plaintiff was entitled to retain possession of the goods until after a demand of payment of the money secured by the bill of sale: on the other hand, upon demand he was under an obligation to pay the money immediately; and if he did not, then the grantees were entitled to seize the goods. Here a demand was made, and such a

demand as by the terms of the deed was warranted, viz., a demand of immediate payment; and the question is, what, by the terms of the bill of sale, is the meaning of "immediately on demand"? The deed must, as was conceded on the part of the defendant's counsel in argument, receive a reasonable construction, and it cannot be meant that the plaintiff was bound to pay in the very next instant of time after the demand, but he must have a reasonable time to get the money. For instance, he may want time to get the money from his desk, or to go across the street or to his banker's for it. There must, in short, be some reasonable extension of time implied in "immediately." So with reference to other circumstances: if, as in the present case, the person making the demand is not the person entitled to the money himself, but the attorneys, the person on whom the demand is made must have an opportunity of inquiry as to the authority of the person making the demand. The attorneys may send a bailiff to make the demand, and authorise him to receive the money; but the mere demand does not intimate to the plaintiff that payment to the bailiff will do; that fact ought at least to have been communicated to the plaintiff. I go yet further, and I say that if the facts

* had been communicated, and if the plaintiff *bonâ fide* [*37] doubted the truth, the plaintiff would have been entitled to some opportunity to inquire before the defendants would have been entitled to seize. Mr. Mills maintained that if a person who is entitled to payment on demand employs some one else to make the demand, that is sufficient, although the authority of the person demanding is not known to the other, or even communicated to him. But that cannot be so; the obvious consequences of such a rule are at once an answer to such a proposition. An intimation of the authority of the person making the demand must either be properly conveyed to the person on whom the demand is made, or the demand must be made in person; otherwise a man might be put in the position of either paying a person not authorised, and so be compelled to pay again, or be at the risk of having his goods seized if the person really turn out to be authorised. Therefore, in this case the absence of all communication by the attorneys to the plaintiff that the bailiff was authorised to receive the money is fatal to the effect of the demand, so as to impose on the plaintiff the necessity and obligation to pay the money, or be in default: inasmuch as he had no opportunity

to go and ascertain how far the authority to demand was really an authority to receive. It was then urged that whatever opportunity for inquiry and payment the plaintiff was entitled to insist upon was waived by the conduct of the plaintiff on the demand being made, and that what was equivalent to an expressed intention not to pay at all, removed the right to say that the plaintiff was entitled to some extension of time. I think there would have been a good deal of force in that, if the question had been left to the jury. But the only question raised by either party for the jury was the mere fact of the demand, and no question was made as to the plaintiff's rights having been waived, the question of what "immediate payment" meant being reserved. I am therefore of opinion that the rule must be made absolute.

WIGHTMAN, J. — I agree with the opinion of the LORD CHIEF JUSTICE, and with what he has said. I may observe, that if it had been suggested at the trial that there had been a waiver by the plaintiff of any right to time, I should have left that question to the jury; and it may be that what the plaintiff said amounted to saying, that it did not signify what time was given, as he could not pay.

BLACKBURN, J. — I am of the same opinion. The power of the grantees to seize is, by the terms of the bill of sale, only when there has been default by the grantor in payment of the money according to the terms of the covenant, "that he will, immediately upon demand thereof in writing, signed by or on behalf of the grantees, being delivered to or left at or affixed to any part of his usual or last known place of abode, pay," &c. In general, where money is made payable on demand, the law holds that the debtor is bound to find out the creditor and pay him. But where, by the express terms of the instrument, time is given up to the time of notice in writing, a reasonable time at least must be meant by "immediately"; and this agrees with what is said in *Com. Dig. tit. "Condition,"* (G. 5): "Where a condition is to be performed immediately, he shall have a reasonable time to perform it, according to the nature of the thing to be done. So if it be to be performed upon demand." And by a "reasonable time" must be meant time enough to seek the creditor, or a person authorised from him to receive the money. Now, was there any ground, in

the present case, for saying that the person who brought the notice was so authorised? The notice is, "As attorneys for and on behalf of W. P. Wilson and J. Pentelow, we hereby demand of you the immediate payment of the £200, &c., due from you to them under a certain indenture, &c. Fisher & Ginn, solicitors, St. Ives, Hunts." Is that, on the face of it, a demand and authority to pay the money to the bearer Jacob? It is signed by the attorneys, and demands payment to them. It was urged by Mr. Mills that the mere fact of a man being employed to bring the notice, does by itself clothe the messenger with authority to receive the money; but I cannot accede to that; and if the messenger might here really have had authority, he does not express it merely from being the person who brought the notice. If there were any evidence that the plaintiff, the debtor, had been told that Jacob had such authority, and that he did not then require time to inquire into the truth of the statement, it might * be [* 38] said that enough had been done if the fact had been communicated, and the plaintiff had not demanded time; but, in fact, there is no evidence that the bailiff communicated that he was authorised to receive the money. Mr. Phear urged that the messenger might be taken to be authorised if the attorneys themselves were not within reasonable distance; and it may be that in such case the bailiff bringing the demand would be *primâ facie* notice to the person bound to pay on demand that he had authority to receive; but the facts do not seem to admit of that argument: the defendants were at hand; indeed, one of them was seen by the plaintiff on the same day very soon after the demand had been made. Again, Mr. Phear urged that there was evidence of waiver on the part of the plaintiff of the necessity of waiting before seizure; and that may be so, though the plaintiff's evidence was to the contrary; but it was the duty of counsel to have made the point at the trial, if it were relied on: and the matter was dealt with at *Nisi Prius* simply on the point whether there had been a written demand, the question of the sufficiency of the demand and default being reserved. I may add, that inasmuch as according to the evidence of the plaintiff himself he only demanded a day's grace, and the sale did not take place till after that time had elapsed, it will be well for the plaintiff to consider his position, as it is very possible that the arbitrator under the circumstances would give merely nominal damages.

MELLOR, J. — The very language of the deed itself shows what is to be the notice given to the debtor that the money is demanded, namely, a demand by or on behalf of the creditors; and then the debtor is bound to pay “immediately,” giving that word a reasonable construction according to the circumstances of the demand. But when the person delivering the demand is, as far as the debtor knows, only the mere carrier, then he is under the necessity of seeking some one to receive the money; and if the bailiff was authorised, as it is conceded he was, something to that effect ought to have been expressed on the face of the notice, or the fact ought at least to have been communicated to the debtor.

Rule absolute.

An appeal having been brought in the Ex-
[32 L. J. Q. B. 383] chequer Chamber, against the above decision of the Court of Queen’s Bench: —

H. Mills (Phear, with him), for the appellants, the defendants below. — There was a sufficient demand. It is enough to give the notice and make the demand in the terms of the deed. It was not necessary that any person to receive the money should be named in the notice. It is to be assumed that payment must be made to the creditor or his agent. The plaintiff knew that Jacobs was authorised to receive the money.

[* 384] * [BRAMWELL, B. — I doubt whether the attorney had any authority to employ Jacobs to receive it. POLLOCK, C. B. — You do not even tell the debtor what is the amount of the interest you claim.]

It is not necessary to do so; the debtor is bound to know the amount which he owes. The seizure was not premature.

[POLLOCK, C. B. — There must be a reasonable time to make payment.]

The intention of the parties is that the money should be paid immediately.

[POLLOCK, C. B. — If a man is paralysed, he would take some time to go and get the money; if a man is dull, he will take perhaps a quarter of an hour to calculate the interest. These are considerations to show that a reasonable time must be meant or understood by the word “immediate.”]

The plaintiff does not ask for time. He says, do your best or your worst. It was not meant that the debtor should have notice to

No. 1. — *Toms v. Wilson*, 32 L. J. Q. B. 384.

enable him to pay the money, but merely to indicate that the creditor meant to use his power. Language could not have been stronger than that of this deed, to show that the compliance must have been meant to be immediately on the demand; that is, while the transaction is *in fieri*, while the demand can be considered pending. The language of the deed authorises the fixing the notice of demand on the premises if the debtor is absent, and even breaking into the house. Further, if a party refuse absolutely to comply, no further time would be allowed. 1 Rolle's Abr. p. 449, l. 15.

O'Malley, for the respondent, the plaintiff below. — The demand is informal and bad. The deed requires the plaintiff to pay Wilson. Wilson could depute the attorney to receive the money, but the attorney could not depute Jacobs. *Clark v. Dignum*, 3 M. & W. 319, 7 L. J. (N. S.) Ex. 64.

(He was here stopped by the Court.)

POLLOCK, C. B. — We are of opinion that the judgment of the Court below ought to be affirmed. We think that there was a demand, but that it was not a demand to pay the bearer. It would be unsafe to make the demand to pay the bearer, as the actually authorised person might have lost the document. There was no intimation in the document that Jacobs was the person to whom the amount was to be paid. Further, we are of opinion that there was no default, so as to justify the seizure, if the bearer was not entitled to be paid. For payment ought to have been made either to Wilson or to his attorney. It is clear that the seizure took place before any attempt could have been made to pay either Wilson or his attorney. Under these circumstances, we think that the action is maintainable, there being a demand but no default. It is agreed that the amount of damages is to be referred to arbitration. If the arbitrator were to award the entire value of the goods, the defendants would be deprived of the benefit of the bill of sale. But we are relieved from this consideration by the case of *Brierley v. Kendall*, 17 Q. B. 937, 21 L. J. Q. B. 161. From this authority there can be no doubt that the arbitrator would not be justified if he awarded the entire value of the goods. He would only be entitled to award such sum as the interest of the plaintiff amounted to at the time of the seizure. We think, there having been a demand without a default, the action may be maintained.

WILLIAMS, J. — I think that there was a good demand here within the meaning of the deed between the parties, because the deed provides not only that a demand may be given in writing, by being delivered, but also by its being left for the plaintiff at his usual place of abode. Therefore, I think that the demand was good without its being shown that the person by whom it was brought had authority to receive the money. But I agree with the CHIEF BARON, that there is no default shown here, because it is stated in the case that Jacobs presented the notice to the plaintiff, and immediately thereupon all the goods of the plaintiff upon the premises were seized, and there was no opportunity afforded of complying with the demand.

The other Judges concurred.

Judgment affirmed.

ENGLISH NOTES.

In the case of *Brightly v. Norton* (1862), 3 B. & S. 305, 32 L. J. Q. B. 38, 9 Jur. (N. S.) 495, 7 L. T. 422, 11 W. R. 167, a bill of sale by way of mortgage of chattels provided that payment should be made in ten years or "at such earlier day or time as the defendant or his agent should appoint for payment thereof by notice in writing sent by post or delivered or left at the house or last known place of abode" of the plaintiff, with a power of immediate entry and sale on default. The defendant, a month after the making of the bill of sale, served a notice at noon to make payment in half an hour, and in default seized and sold the goods. The plaintiff brought his action for selling the goods contrary to the proviso. BLACKBURN, J., at the trial had left it to the jury to say whether the notice was reasonable. The jury found it was not, and gave a verdict for the plaintiff accordingly. The Court sustained the verdict, being of opinion that the plaintiff was entitled to a reasonable notice, *i. e.* a notice giving him a reasonable time to find the money.

Mussey v. Sladen (1868), L. R. 4 Ex. 13, 38 L. J. Ex. 34, was another case arising out of a bill of sale. The bill of sale, which was by way of mortgage of machinery, &c., contained a proviso for redemption, if the plaintiff should pay *instantly on demand*, and *without delay on any pretence whatever*; and provided that the demand might be made personally on the plaintiff, or by giving or leaving verbal or written notice to or for him at his place of business, &c., so nevertheless that a demand be in fact made; that on default of payment the defendants might enter, &c. In the plaintiff's absence from his place of business, a demand was made there by the defendants upon his son, who stated his inability to meet it; and the defendants immediately

No. 1. — *Toms v. Wilson.* — Notes.

seized. It was held that the notice required by the deed in case of the plaintiff's absence was such a notice as might be reasonably supposed to reach the plaintiff, and to give him an opportunity of complying with it in a reasonable time; and that the seizure was, therefore, not justified.

The two last cases were distinguished by the Judges in the Court of Exchequer in *Wharlton v. Kirkwood* (1873), 29 L. T. 644, 22 W. R. 93, where the condition of the bill of sale was that if the plaintiff did not "immediately upon demand thereof in writing" delivered to the plaintiff or left for him at his home, pay the money due, it should be lawful for the defendant to seize and sell the goods. The defendant having gone with his bailiffs to the plaintiff's house, saw his wife and son, who told him that the plaintiff was from home, they knew not where, and that he might be gone to America for aught they knew. The defendant then read and delivered to the wife and son a written demand for payment, which, not being complied with, he at once put the bailiffs in possession, and, after an interval of eight days, sold the goods. The plaintiff subsequently returned, having remained away, as he expressed it, on a "spree." The Court held that the action taken by the defendant was reasonable and within his rights under the instrument.

Moore v. Shelley (1883), 8 App. Cas. 285, 52 L. J. P. C. 35, 48 L. T. 918, was a case before the Judicial Committee of the Privy Council on appeal from New South Wales. The action was for damages for trespass on land and for the seizure and conversion of goods. The question arose upon a mortgage of a sheep run for £9000. The deed stipulated that if the plaintiff should make default in payment of the £9000 upon demand, it should be lawful for the mortgagee to enter upon and seize the mortgaged property, and in his discretion to manage, and immediately thereupon, or at any time thereafter, to sell, &c. The deed further stated that the demand should be made in writing for or on behalf of the mortgagee, and delivered either personally to the mortgagors or either of them, or left at their or his usual or last known place of abode in the colony, or on the station or run, or sent through the medium of any post office, addressed to them or either of them. The deed was executed on the 5th of July, and on the 29th of August following, the defendant, who was the assignee under the mortgage, sent an agent with a written demand for the £9000, which the bearer was authorised to receive. The demand was left at the station, — the plaintiff being absent, and his wife left alone there, — and, on the ground that the sum of £9000 was not then immediately paid to the agent, he seized the sheep and sold them. The jury had given a verdict for the plaintiff, with substantial damages, and the verdict was

No. 2. — Warwicke v. Noakes, 1 Peake, 67. — Rule.

upheld by the Judge who tried the case and by the full Court. The Judicial Committee affirmed this judgment. The plaintiff, who was absent on business of the farm, had no opportunity of judging whether the alleged authority of the agent to receive the £9000 was genuine; and the jury and judges in the Colony were best able to consider what was a reasonable opportunity of meeting the demand in the circumstances of a sheep run, and what damages should be given for a premature seizure.

AMERICAN NOTES.

That no demand is required in the case of contracts to pay money generally, is well settled. *Niemeyer v. Brooks*, 44 Illinois, 77; *Princeton v. Gebhart*, 61 Indiana, 187; *Olvey v. Jackson*, 106 Indiana, 286; *McDonald v. Gray*, 11 Iowa, 508; *Watson v. Walker*, 23 New Hampshire, 471; *Purdy v. Phillips*, 1 Duer (N. Y.), 369; *Maguire v. Durant*, 20 New York Supp. 617; *Chappell v. Woods*, 9 Washington, 134. The debtor must seek out the creditor if he is within the state. *Smith v. Walton*, 5 Houston (Del.), 141; *Littell v. Nichols*, Hardin (Ky.), 66. Not, however, if he is in another state. *Gill v. Bradley*, 21 Minnesota, 15.

Where the debtor is bound by the contract to pay "immediately on demand," the rule that he is to be allowed a reasonable opportunity for complying with the demand is an illustration of the general rule that Courts will construe "immediate," in all sorts of contract, to mean within a reasonable time. Cases of various sorts, illustrating this rule, are collected in 9 Am. & Eng. Encycl. of Law, 1st ed. 931-933.

No. 2. — WARWICKE v. NOAKES.

(1791.)

RULE.

WHERE a debtor is directed by his creditor to remit money by post, the posting of a letter enclosing the remittance as directed constitutes a payment, although the letter be lost.

Warwicke v. Noakes.

1 Peake, 67-68 (3 R. R. 653).

Payment. — Money remitted by Post.

[67] If a debtor is directed by his creditor to remit money by the post and it is lost, the creditor must bear the loss.

Assumpsit for goods sold and delivered, and money had and received.

No. 2. — *Warwicke v. Noakes*, 1 Peake, 68. — Notes.

* The plaintiff was a hop merchant, and the defendant his [* 68] customer, living at Sherborne in Dorsetshire. The plaintiff sold him hops, and also sold hops to several other persons in that neighbourhood; and requested the defendant (as his friend) to receive the money due to him from his other customers, and remit him by the post a bill for those sums, and also the money due to him from the defendant himself. A bill was accordingly remitted, but the letter got into bad hands, and the bill was received by some third person at the banker's on whom it was drawn.

Lord KENYON: —

Had no directions been given about the mode of remittance, still this being done in the usual way of transacting business of this nature, I should have held the defendant clearly discharged from the money he had received as agent. It was so determined in the Court of Chancery forty years since: and as the plaintiff in this case directed the defendant to remit the whole money in this way, it was remitted at the peril of the plaintiff.

The plaintiff was nonsuited.

ENGLISH NOTES.

A direction to send by post has been held not complied with by a delivery to a postman in the street of a letter with remittance enclosed. *Hawkins v. Rutt* (1793), 1 Peake, 248.

Where debtor and creditor have accounts at the same bank, and the creditor directs payment to be made at this bank, — the transfer of the amount in the banker's books on the order of the debtor effects a payment, although the bank fails, so that the creditor loses the benefit of the transfer. *Eyles v. Ellis* (1827), 4 Bing. 112.

Where the creditor requests his debtor to remit money, a remittance by banker's bill, which is not immediately returned, is presumed to have been authorised. *Caine v. Coulson* (1863), 1 Hurl. & Colt. 764, 32 L. J. Ex. 97.

But where the debtor, without any direction from the creditor, sent a post-office order, with a wrong Christian name, so that the creditor could not get it cashed without signing a name that was not his, this was held no payment, although the creditor kept the order. The Court said the defendant had no right to give the plaintiff the trouble of sending back a piece of paper which he had no right to send him. *Gordon v. Strange* (1847), 1 Exch. 477, 11 Jur. 1019. And where the debtor sent a cheque with a statement in the body of the cheque "balance account railing;" this was held no payment, although the cred-

No. 2. — Warwicke v. Noakes. — Notes.

itor kept the cheque. Lord DENMAN said: "To make the delivery of a cheque payment, it should at least be unconditional." *Hough v. May* (1836), 4 A. & E. 954, 6 N. & M. 535, 2 H. & W. 33.

An agreement to set off a debt against a credit, carried into effect by an account stated between the parties, is equivalent to payment. *Owens v. Denton* (1835), 1 Cr. M. & R. 711, 40 R. R. 692; *Woolthorpe v. Grimsditch* (1845), 7 Q. B. 479.

AMERICAN NOTES.

Where a debtor is expressly or impliedly authorized by his creditor to remit payment by mail, and the money is so sent, in the proper manner, it is a valid payment and discharges the debt, although it never reaches the creditor. *Gurney v. Howe*, 9 Gray (Mass.), 404; *Morgan v. Richardson*, 12 Allen (Mass.), 410; *Palmer v. Phoenix Mutual Life Ins. Co.*, 84 New York 63; *McCheskey v. National Life Ass'n*, 77 Hun (N. Y.), 556; 2 Greenleaf on Evidence, Lewis' ed., sect. 525; Benjamin on Sales, 6th ed. p. 727.

"Payment is often made by letter: and the question arises, at whose risk it is when so made. This must depend upon circumstances: but in general the debtor is discharged, although the money do not reach the creditor, if he was directed or expressly authorized by the creditor so to send it, or if he can distinctly derive such authority from its being the usual course of business: but not otherwise." 2 Parsons on Contracts, 8th ed. *620-621.

The same rule applies to payment sent by any other method, as by express. *Currier v. Continental Life Ins. Co.*, 53 New Hampshire, 538; or boat, *You v. Blanchard*, 75 Georgia, 519; or through a specified person, *Dodge v. Smith*, 34 Vermont, 178. See 2 Parsons on Contracts, 8th ed. *621, note 1.

The burden of proof is on the debtor to show, either that the creditor expressly authorized payment by mail, or that a usage and course of dealing existed from which such authorization might fairly be inferred. If he fails to sustain this burden of proof, the money must be regarded as having been sent at his risk, and, if not received, must be paid again. *Williams v. Carpenter*, 36 Alabama, 9; *Morton v. Morris*, 31 Georgia, 378; *Gurney v. Howe*, 9 Gray (Mass.), 404; *First National Bank v. McManigle*, 69 Pennsylvania State, 156; *Boyd v. Reed*, 6 Heiskell (Tenn.), 631. In *Gurney v. Howe*, *supra*, the Court said: "The general rule of law is that the duty lies on the debtor to pay his debt to his creditor personally or to his authorized agent. The burden of proof to show a payment of a debt is not sustained therefore by proof that a letter, containing the requisite amount, directed to the creditor, was duly deposited in the post office. The debtor must go further. He must also show that the creditor authorized this mode of remittance, either by express assent or direction, or a usage and course of dealing from which such assent or direction may be fairly inferred. If this can be shown, then the transmission is at the risk of the creditor; otherwise, it lies upon the debtor."

In *Townsend v. Henry*, 9 Richardson, Law (S. Car.), 318, it was held that a request by mail to a debtor to "remit to us as soon as received" authorized remittance by mail, no other prompt mode being practicable.

No. 3. — *Hart v. Nash*, 2 Cr. M. & R. 337. — Rule.

But a remittance by mail in a single previous instance, not objected to by the creditor, will not establish a custom to remit in that way; nor will a letter of the creditor, requesting a remittance, but specifying no mode, prove authority to remit by mail. *Burr v. Sickles*, 17 Arkansas, 428.

If the creditor authorizes remittance by mail under certain specified precautionary observances, and the debtor remits without observing such precautions, it is no excuse that their observance was impossible. See *Williams v. Carpenter*, 36 Alabama, 9, in which case, at p. 12, the Court said: "To absolve a debtor who transmits money by mail to his creditor for the payment of his debt, from the hazard of loss in the transmission, it is necessary that the remittance should be made by the authority, express or implied, of the creditor, and in the manner and with the precautions prescribed by him. . . . If it is impossible for the debtor to transmit the money in the manner and under the precautionary attendant circumstances directed by the creditor, he can not make the remittance at the risk of the creditor. His authority is to remit in the manner and under the circumstances prescribed, and if he remits without pursuing the directions, he acts without authority. Like an agent, he must pursue his authority, and strictly observe its limitations and qualifications."

As to whether, in the absence of authority to remit by mail, proof of the depositing of letter containing money in the post office, addressed to the creditor, gives rise to a presumption that he received it, see *Crane v. Pratt*, 12 Gray (Mass.), 348.

No. 3. — *HART v. NASH*.

(EX. 1835.)

No. 4. — *WALKER v. NUSSEY*.

(EX. 1847.)

RULE.

PAYMENT, under the Statute of Limitations, may be made in goods as well as in money.

To constitute "part payment" under the Statute of Frauds, there must be evidence (parol or otherwise) of a contract complete in itself irrespective of the payment.

Hart v. Nash.

2 Cr. M. & R. 337 (41 R. R. 732).

Statute of Frauds. — Part Payment.

If the parties to a bill of exchange agree that goods shall be supplied [337] in part payment, and they are supplied and taken accordingly, that is part payment, so as to prevent the operation of the Statute of Limitations.

No. 4. — Walker v. Nussey, 16 Mees. & Wels. 302.

Assumpsit by indorsee against indorser of a bill of exchange. Plea, *actio non accerit infra sex annos*, and issue thereon. At the trial before DENMAN, Ch. J., at the last Surrey Assizes, the plaintiff had a verdict, the learned Judge ruling that the delivery of certain hats by the defendant to the plaintiff amounted, under the circumstances, to part payment of the bill (which was above six years old), so as to take the case out of the operation of the Statute of Limitations. Platt having subsequently obtained a rule *nisi* for a new trial, Comyn now appeared to show cause; but it appearing from the report of the learned Judge, that there was an agreement between the plaintiff and defendant, at the time of the transfer of the bill, that the defendant should supply the plaintiff and his family with hats till he could pay it, and that the hats "should be paid on account," Platt admitted that he could not support his rule;

ALDERSON, B., observing: —

Here was an agreement to take goods in part payment; when they were taken on that agreement, it was part payment, and was a continuation of the old promise, so as to bring the case within the exception in Lord Tenterden's Act. *Rule discharged.*

Walker v. Nussey.

16 Meeson & Welsby, 302-307 (s. c. 16 L. J. Ex. 120).

Statute of Frauds. — Part Payment.

[302] Debt for goods sold and delivered. Pleas, — never indebted and set-off. Plaintiff owed defendant a debt, and while it remained due sold him goods by sample to a larger amount, and exceeding £10, without note or memorandum in writing of the bargain for sale. Part of that bargain was, that the debt due from plaintiff was to go in part payment by defendant to him, but no actual payment of money was made by either, nor was any receipt given by defendant for plaintiff's debt to him. The goods were supplied to defendant, who returned them as inferior to sample, and the jury found that he had never accepted them. Verdict for defendant: — *Held*, on motion for a new trial, that nothing had been given in earnest to bind the bargain, or in part of payment, within 29 Car. II. c. 3, s. 17, so as to make the contract binding on the buyer.

Debt for goods sold and delivered, and on an account stated. Pleas, — 1st, never indebted; 2nd, a set-off for goods sold and delivered, and on an account stated. Issues thereon.

No. 4. — Walker v. Nussey, 16 Mees. & Wels. 302, 303.

At the trial, before the under-sheriff of Yorkshire, it appeared that, the defendant having sold goods to the plaintiff to the amount of £4 14s. 11d., the defendant, on a subsequent occasion, bought of him a lot of leather, of two sorts, by sample. It was then verbally agreed between them, that the £4 14s. 11d. due to the defendant should go in part payment by him to the plaintiff for the leather. Next day the plaintiff sent in the goods to the defendant, with this invoice:—

“HALIFAX, Oct. 14th, 1846.

“Mr. William Nussey, bought of Thomas Walker.

	£	s.	d.
Dressed hide bellies, 287 at 9d.	10	15	3
Insole, 376 at 6½	10	3	8
	20	18	11
By your account against me	4	14	11 ”

The defendant returned the goods within two days as inferior to sample, and wrote to the plaintiff to pay him the £4 14s. 11d. The plaintiff refused to receive the goods, and brought this action, stating, in his particulars of demand, that the action was brought to recover the sum of £16 4s., as the “balance of the following account” (setting out the above invoice).

The under-sheriff ruled, that there was nothing to show that the £4 14s. 11d. had been given by the defendant in earnest, or part of payment, under 29 Car. II. c. 3, s. 17, and left nothing to the jury, except on the point of acceptance * of the [*303] goods by the defendant, directing them to find for him if they thought he returned the goods in a reasonable time, without taking to them. See *Lillywhite v. Devereux*, 15 M. & W. 285; *Street v. Blay*, 2 B. & Ad. 463 (36 R. R. 626); *Edon v. Dudfield*, 1 Q. B. 302. The jury found a verdict for the defendant on both issues.

Addison now moved for a new trial, on the ground of misdirection. By 29 Car. II. c. 3, s. 17, “no contract for the sale of any goods, wares, and merchandises for the price of £10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or

 No. 4. — Walker v. Nussey, 16 Mees. & Wels. 303, 304.

their agents thereunto lawfully authorised." This transaction amounted to an agreement that, on the defendant's purchasing the leather, the £4 14s. 11d. before then due to him from the plaintiff, was to be a part of the purchase-money accruing due to him. That agreement enured, therefore, to take this case out of the statute, as part payment within sect. 17. [PARKE, B. — When was the plaintiff's debt to the defendant satisfied, so as to be the subject of a plea of payment, had the defendant sued him? The leather was to be delivered by the plaintiff and taken by the defendant in satisfaction of the £4 14s. 11d. due from the plaintiff to the defendant, and the rest of it was to be paid for by the defendant. Was not the contract prospective, and the plaintiff's debt to the defendant only eventually extinguished, in case of the defendant's acceptance of the leather subsequently sent to him by the plaintiff?] The under-sheriff merely left the question of acceptance to the jury. But in *Hart v. Nash*, 2 C. M. & [* 304] R. 337 (p. 17, *ante*), where the holder *of a bill agreed with the party liable to pay it, that, till he could pay it, he should supply the holder with hats, and that they should be "paid on account;" the Court held that the delivery and receipt of the hats under that agreement was "part payment" within the Statute of Limitations, 9 Geo. IV. c. 14. [ALDERSON, B. — There the supply of hats by the defendant, in part payment, was subsequent to the agreement, which is very different. The words of sect. 17 are not, "except the buyer shall have accepted," but "except the buyer shall accept," part of the goods so sold, and actually receive the same, — that is, at the time of the bargain made.] It was not necessary that the money should have been paid by the plaintiff, in order to be repaid by the defendant in part payment for his purchase; for, from the moment of the agreement, the defendant's goods became part payment of those agreed to be delivered to him by the plaintiff, and the defendant had no longer any cause of action against the plaintiff. [PLATT, B. — You rely on part of the contract itself as being part performance of it.]

POLLOCK, C. B. — I think no rule ought to be granted. The plaintiff sues for goods sold and delivered by him, to the defendant, above £10 in value, and it was admitted that the defendant had previously sold him goods for £4 14s. 11d. On the new dealing between them the agreement was, that that sum should be

No. 4. — Walker v. Nussey, 16 Mees. & Wels. 304, 305.

taken as part payment by the defendant, and that he should only pay the plaintiff the difference between that sum and the amount of the goods bought from him. This contract was verbal; but it is argued that the £4 14s. 11*d.* was a part payment by the defendant, so as to take the case out of the Statute of Frauds. But I think it was not. Here there was nothing but one contract, whereas the statute requires a contract, and, if it be not in writing, something besides. The question here is, whether what took place amounted to a giving of earnest or in part of payment at the time of the bargain, the goods bought by the defendant not having been then delivered to him by *the plaintiff. See [*305] *Blenkinsop v. Clayton*, 7 Taunt. 597 (18 R. R. 602). Nothing turns on the effect of their subsequent delivery. Had these parties positively agreed to extinguish the debt of £4 odd, and receive the plaintiff's goods *pro tanto* instead of it, the law might have been satisfied, without the ceremony of paying it to the defendant, and repaying it by him. But the actual contract did not amount to that, and there has been no part payment within the statute.

PARKE, B. — I am of the same opinion, and think the ruling at the trial was right. The facts seem to be these. The plaintiff owed the defendant a sum of £4 14s. 11*d.* The parties then verbally agreed that the plaintiff should sell to the defendant goods above £10 in value, according to a given sample, the plaintiff's debt to go in part payment, and the residue to be paid by the defendant. No evidence was given of the actual payment or discharge of the debt due from the plaintiff, so that all rested in the agreement merely. If Mr. Addison could have shown the contract to have been, that the parties were to be put in the same situation at that time, as if the plaintiff's debt to the defendant had then been paid, or as if it had been paid to the defendant, and repaid by him to the plaintiff as earnest, the statute might have been satisfied, without any money having passed in fact; but the agreement was in fact, that the goods should be delivered by the plaintiff by way of satisfaction of the debt previously due from him to the defendant, and that the defendant should pay for the rest. Then the buyer did not "give something in earnest to bind the bargain, or in part of payment." The "part payment" mentioned in the statute must take place either at or subsequent to

the time when the bargain was made. Had there been a bargain to sell the leather at a certain price, and subsequently an agreement that the sum due from the plaintiff was to be [* 306] *wiped off from the amount of that price, or that the goods delivered should be taken in satisfaction of the debt due from the plaintiff; either might have been an equivalent to part payment, as an agreement to set off one item against another is equivalent to payment of money. But as the stipulation respecting the plaintiff's debt was merely a portion of the contemporaneous contract, it was not a giving something to the plaintiff by way of earnest, or in part of payment, then or subsequently.

ALDERSON, B. — The 17th section of the Statute of Frauds implies, that to bind a buyer of goods of £10 value, without writing, he must have done two things; first, made a contract, and next, he must have given something as earnest, or in part payment or discharge of his liability. But where one of the terms of an oral bargain is for the seller to take something in part payment, that term cannot alone be equivalent to actual part payment. In this case, the part payment, or whatever else the bargain may amount to, is part of that bargain itself, and cannot be wrested into proof of an actual payment, without repealing the statute, and suffering a verbal contract for the sale of goods of £10 value to have effect, without the safeguards provided by law against fraud in such cases.

PLATT, B. — In this case, as no note in writing was signed by the parties, it is clear, from sect. 17, that something was to be done by way of ratifying the bargain, in addition to it, and at the time of its being made. If, on making the bargain, the defendant resigned the debt previously due to him from the plaintiff, or discharged the plaintiff's liability to that amount, that would not be giving earnest at the time of the bargain made, or in part of payment of the whole sum then due from the defendant. As to any discharge of the plaintiff from liability to the defendant at the time of making the second bargain between them, no receipt for the * plaintiff's debt was given by the defendant, or any other thing done by him, so that everything rested in mere verbal contract, and nothing in the evidence makes it binding on the defendant. *Rule refused.*

ENGLISH NOTES.

The above case of *Hart v. Nash* was followed by the Queen's Bench in *Hooper v. Stephens* (1835), 4 A. & E. 71.

Where the creditor was boarded and lodged by the debtor under an agreement that he should do so at a fixed price in deduction from the debt, this was held to be part payment within the statute. *Blair v. Ormond* (1851), 17 Q. B. 423, 20 L. J. Q. B. 444.

Walker v. Nussey was followed by the Court of Appeal in *Norton v. Davison* 1899, 1 Q. B. 401, 68 L. J. Q. B. 265. There was an oral contract for the sale of goods; and it was agreed at the same time that a sum of money which had been overpaid to the vendor upon a previous sale of goods should be retained by the vendor as part of the price. The Court inferred from the evidence that this stipulation was a term of the contract of sale itself, and held that the retention of the sum was not payment to satisfy the Statute of Frauds.

AMERICAN NOTES.

Mr. Buswell, in his book on Limitation and Adverse Possession, § 87, says: "If it be agreed that the creditor shall receive goods in reduction of his demand, the delivery of the goods operates as a partial payment." Citing the principal case of *Hart v. Nash*, and also *Sibley v. Lambert*, 30 Maine, 253, and *Butts v. Perkins*, 41 Barbour (N. Y.), 509. And in 1 Wood on Limitations, 2nd ed. p. 299, it is said: "It is not necessary, for the purposes of the statute, that a part payment of principal or interest should be made in actual money. Thus, a payment in goods may be a sufficient part payment, and if parties to a bill of exchange agree that goods shall be supplied and taken accordingly, that amounts to a part payment."

It is essential that the goods should have been intended as part payment of the debt. Thus, in *Young v. Alford*, 113 North Carolina, 130, which was an action on three bonds, the following facts appeared. Some years after action on the bonds was barred by the statute, plaintiff got a quart of brandy of defendant's intestate, the obligor, and offered to pay for it, but the intestate refused to accept payment on the ground that he already owed the plaintiff more than he could ever pay. No price was named for the brandy, and there was no request to apply its value to any indebtedness, and no specific indebtedness was mentioned. There was an indorsement of a credit of twenty-five cents on each bond, of a date within the statutory period. There was no evidence that the debtor directed or assented to such indorsement. The Court held that there was nothing to show that the plaintiff was authorized to estimate the value of the brandy and credit it on the bonds as payment.

Where goods are delivered to a creditor to be sold and the proceeds applied in liquidation of the debt as far as they will go, the goods must be sold and the proceeds applied upon the debt within a reasonable time, or the applica-

 Nos. 3, 4. — *Hart v. Nash*; *Walker v. Nussey*. — Notes.

tion of the proceeds upon the debt will not save it from the operation of the statute, "else in such cases, by unreasonable delay, a creditor could keep his debt on foot indefinitely." 1 Wood on Limitations, 2nd ed. p. 301; *Lyon v. State Bank*, 12 Alabama, 508; *Porter v. Blood*, 5 Pickering (Mass.), 54.

In *Jones v. Langhorne*, 19 Colorado, 206, it was held that where the part payment alleged is money realized from assets transferred by the debtor to the creditor, the new promise is not to be implied as of a date later than the transfer.

And in *Brown v. Latham*, 58 New Hampshire, 30, it was decided that where chattels were placed in the hands of the payee of a note by the maker, at the date of the note, under an agreement to apply the proceeds to the payment of the note, such application, without notice to and assent by the debtor, would not constitute a payment from which a new promise might be inferred.

With regard to the second paragraph of the rule, the principal case of *Walker v. Nussey* is recognized as a leading authority, and constantly cited as such, in the United States.

In *Tiffany on Sales*, p. 66, it is said that a mere agreement, forming part of the contract of sale, to set off a debt due the buyer, does not constitute part payment within the Statute of Frauds, but that such an agreement, to be effective, must be by an independent contract. Citing *Walker v. Nussey*, and the following American cases: *Artcher v. Zeh*, 5 Hill (N. Y.), 200; *Mattice v. Allen*, 3 Keyes (N. Y.), 492; *Pitney v. Glen's Falls Ins. Co.*, 65 New York, 6; *Matthiessen & Weichers Refining Co. v. McMahon*, 38 New Jersey Law, 536; *Norwegian Plow Co. v. Hawthorn*, 71 Wisconsin, 529.

In *Artcher v. Zeh*, 5 Hill (N. Y.), 200, an action was brought on a claim against the defendant which one McDuffie had assigned to the plaintiff. The plaintiff held a note of McDuffie's, and at the time of the assignment it was understood that, if the defendant would assent to the assignment, the plaintiff would indorse the amount of the claim on the note as a payment. The defendant assented. Assignments of choses in action being covered by the New York Statute of Frauds, the Court held that there was no compliance with its requirements, the agreement regarding the note not amounting to payment.

In *Ely v. Ormsby*, 12 Barbour (N. Y.), 570, it was held that an agreement to indorse the price of property sold upon a mortgage held by the purchaser, against the vendor, without any indorsement being in fact made, did not constitute payment within the statute.

In *Walrath v. Richie*, 5 Lansing (N. Y.), 362, A., being the owner of a mowing machine, and being indebted to B. in the sum of fifty-five dollars, proposed to B. verbally to take it in satisfaction of the indebtedness, to which B. assented. It was held that this was not a valid sale under the Statute of Frauds. See also *Mattice v. Allen*, 3 Keyes (N. Y.), 492; *Teed v. Teed*, 44 Barbour (N. Y.), 96.

In *Sawyer v. Ware*, 36 Alabama, 675, A. was indebted to B. for advances and rent, and it was agreed that certain iron in course of manufacture by A. should be B.'s as fast as it was made, until the debt was paid. The Court cited *Walker v. Nussey*, and held that the agreement so to discharge the purchase-money was not a payment.

Nos. 3, 4. — Hart v. Nash; Walker v. Nussey. — Notes.

In *Gilman v. Hill*, 36 New Hampshire, 311, 319, the Court said: "The fact that, at the time of the bargain, it was agreed between the parties that the \$50 for the cow, and money previously received, should be allowed towards the pelts, seems not to have been regarded by the Court as a payment answering the requirements of the statute, and thus was not alluded to. And this we think was the right view of the matter. It was not an act done, a payment actually made, but simply an agreement that the sum should be allowed, a matter resting in contract only."

In *Matthiessen Refining Co. v. McMahon*, 38 New Jersey Law, 536, it was held that a contract for the sale of goods for the price of \$30 or upwards, by parol, whereby the vendor sells to the purchaser goods to the value of an existing debt due from him to the purchaser in payment thereof, is not valid under the Statute of Frauds, there being no receipt or voucher given, or actual credit made, in discharge of the debt. At page 540, the Court say: "*Walker v. Nussey* has been adopted without dissent in the text-books. Benj. on Sales, 139; Story on Sales, 273, a; 1 Chitty on Contracts, 564; 3 Parsons on Contracts, 52. Substantially the same doctrine was held by the Supreme Court of New York in a case earlier in point of time (*Artcher v. Zeh*, 5 Hill, 200), and it has been reaffirmed in cases decided since."

A point upon which stress is laid in some of the above cases is that everything lay in parol, and it is implied that if there had been some act, such as the surrender or cancellation of the evidence of indebtedness, or the giving of a receipt, it would amount to part payment within the statute. And in *Norwegian Plow Co. v. Hanthorn*, 71 Wisconsin, 529, where goods were transferred by A. to B. in part payment of a debt due from B. to A., and credit was at once given upon the account, it was held that this was as much payment as if money had been handed over. So, in *Brabin v. Hyde*, 32 New York, 519, 523, the Court say: "The payment may be made in money or property, or in the discharge of an existing debt, in whole or in part, due from the vendor to the purchaser. Or the extinguishment of, or payment upon, a promissory note held by the latter against the former. A mere agreement to apply the purchase-money to either of these objects, would not be enough, because the contract would still rest in words and nothing more."

It would seem that the question should turn on whether or not the stipulation regarding payment is independent, and not a mere term of the contract of sale, rather than on whether or not the whole thing "lies in parol." "On principle, any independent verbal agreement, whereby the indebtedness is extinguished, would seem to be sufficient." Tiffany on Sales, 66; *Dow v. Worthen*, 37 Vermont, 105; *Cotterill v. Stevens*, 10 Wisconsin, 422. In *Dow v. Worthen*, *supra*, D. sold H. apples and sent several barrels more than H. agreed to take, with notice that what H. could not sell, D. would take back. H. afterwards concluded to take all that D. had sent. They then agreed that the price of the whole, before unsettled, should be \$75, and that this sum should remain in the hands of H. as part payment for a lot of poultry which D. was then negotiating to purchase, and finally did purchase of H. It was held that the contract for the poultry was binding within the Statute of Frauds. The Court comment on *Walker v. Nussey*, and say: "The statute

No. 5. — Underwood v. Nicholls, 25 L. J. C. P. 79. — Rule.

only requires actual part payment. It does not require that such payment shall be shown by writing — by an indorsement, a credit, or a receipt, or by the manual delivery of any article or property of value. It leaves the parties to prove payment by such proof as they may have; but it does require proof of *payment*, and not of a mere *agreement to pay* or to apply in payment.”

No. 5. — UNDERWOOD v. NICHOLLS.

(C. P. 1855.)

No. 6. — CATTERALL v. HINDLE.

(C. P. 1866, and EX. CH. 1867.)

RULE.

AN agent authorised to receive payment has *prima facie* no authority to receive it otherwise than in money according to the usual course of business.

But an authority to the agent to receive payment by credit on a running account may be implied from a course of business in which the agent has a running account with his principal as well as with the customers, and where it is the practice for the agent to credit the principal with the sums he from time to time receives by credits from his customers, and for the principal to treat the account as liquidated accordingly.

Underwood v. Nicholls.

25 L. J. C. P. 79–80 (S. C. 17 C. B. 239).

[79]

Principal and Agent. — Payment.

If a creditor employs an agent to receive money of a debtor, and the agent, instead of receiving money, writes off a debt due from himself to the debtor, the latter is not thereby discharged. Therefore, where C., who was employed by the plaintiff to receive payment of a debt from the defendant, accepted as payment a cheque of his own, which the defendant had previously cashed for his accommodation. — *Held*, that as the plaintiff had not ratified C.’s act, the defendant was not discharged.

Declaration for goods sold and delivered.

Pleas, never indebted, and payment.

The cause came on by writ of trial, before the Judge of the Sheriff's Court, in London, in July last, when it appeared that the defendant, in June, 1854, purchased a quarter cask of sherry of the plaintiff for £17, and that Cooper, the plaintiff's agent, called upon the defendant for payment in the following August. A few days previously the defendant had cashed, for Cooper's accommodation, a cheque drawn by Cooper for £12, and having * this cheque still in his possession, when Cooper [* 80] called, he returned it and five sovereigns to him in payment for the sherry, and Cooper gave him a receipt for the full amount. Cooper having died without paying the plaintiff, the latter demanded payment of the defendant, but said he would be satisfied if the defendant could produce Cooper's receipt: this the defendant was unable to do, as he had lost it, and the plaintiff then brought this action. The jury found that the payment to Cooper was *bona fide*, and was accepted by him in payment for the sherry. The verdict was entered for the defendant, and leave was reserved to the plaintiff to move to enter a verdict for £12 if the Court should be of opinion that the payment by Cooper's cheque was, under the circumstances, of no avail.

Charnock obtained a rule *nisi* accordingly, and cited *Todd v. Reid*, 4 B. & Ald. 210; *Russell v. Bangley*, 4 B. & Ald. 395; and *Howard v. Chapman*, 4 Car. & P. 508.

O'Malley and Stammers now showed cause. — The only question is, whether Cooper had authority to receive a cheque at all as payment; that, as was said in *Sir Charles Thorold v. Smith*, 11 Mod. 88, is more matter of evidence than law. No doubt, according to ordinary practice in mercantile dealings, payment by a cheque is good payment. If, then, the defendant might have given his own cheque, or a cheque drawn by some other person, in payment, there seems no good reason why he might not give Cooper's cheque. In *Stewart v. Aberdeen*, 4 M. & W. 211, 7 L. J. (N. S.) Ex. 292, Lord ABINGER, in summing up, expressed his opinion "that the notion had been pushed too far about the actual payment in cash, and that it appeared to him that if one man has to give another money on account of his principal, and there is money due to him from such other person, it makes no difference to the principal whether there is an interchange of bank notes, or a mere transfer of accounts from one side to the other, and that it is equally a payment, if it is done without fraud." At all events,

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if the plaintiff here subsequently ratified what the agent had done, the defendant was discharged. *Howard v. Chapman*. When told of the transaction, he only required the defendant to produce Cooper's receipt, thereby admitting the validity of the payment if made, but requiring proof of the fact.

[JERVIS, Ch. J. — The question of ratification was not left to the jury. If the defendant relies upon a subsequent ratification by the plaintiff, he ought to have had that fact found by the jury.]

Charnock was not called upon to support the rule.

JERVIS, Ch. J. — I am of opinion that this rule should be made absolute. It is no more than the simple case of the agent writing off money due from him to the debtor, by way of discharging the debt due from the debtor to the agent's principal. Cooper had no authority to accept his own cheque as payment of the defendant's debt to the plaintiff.

WILLIAMS, J., concurred.

CROWDER, J. — The jury have not found that the plaintiff ratified the act of Cooper, and the defendant did not ask that that question should be left to them. If the plaintiff did not ratify that act, it is clear that Cooper could not write off his own debt to the defendant by way of discharging the defendant's debt to the plaintiff.

WILLES, J. — It might have been easily proved, if the fact were so, that payment by cheque was a good payment, according to the usual course of business. But this is not payment by the defendant's own cheque, but by the agent's cheque, which was not money, nor anything representing money. It was not proved that Cooper had any authority to accept it as payment, nor that the plaintiff had ratified Cooper's act. *Rule absolute.*

Catterall v. Hindle.

L. R. 1 C. P. 186-191, 2 C. P. 368-371 (s. c. 35 L. J. C. P. 161).

[1867] *Principal and Agent. — Payment in the Ordinary Course of Business.*

A., a broker, sold some cotton yarn to the defendant. Before its delivery the defendant paid to A. in advance £1000 on his general account. Part of the yarn was sold by A. as agent for the plaintiff on a *del credere* commission. The value of the yarn being more than £1000 the defendant paid the differ-

No. 6. — *Catterall v. Hindle*, L. R. 1 C. P. 186, 187.

ence to A. in cash, and so balanced the accounts between them. A. did not pay over to the plaintiff the value of his yarn, and became bankrupt: —

Held, by the Court of Common Pleas, that the defendant was still liable to the plaintiff for the price of his yarn, except to the extent of the cash payment: the advance of £1000 to A. not amounting to a prepayment, because it was on the general account; and the settlement of accounts not constituting payment as against the plaintiff: as an agent, whether acting on a *del credere* commission or not, is only authorised to receive payment in cash, in the absence of any practice or custom to the contrary.

But *held*, in the Exchequer Chamber, that it was a question of fact for the jury whether, having regard to the custom of the trade, payment to the broker in advance was a good payment against the principal, — and, that question not having been left to the jury, the Court ordered a new trial.

This was an action for goods sold and delivered, and on accounts stated. The pleas were, never indebted and payment.

The cause was tried before MONTAGUE SMITH, J., at Lancaster, at the last Summer Assizes; when it appeared that the plaintiff was a cotton-spinner, and had been in the habit for some time previous to February, 1865, of employing Joshua Armitage

* as his agent, on a *del credere* commission, to sell yarn for [* 187] him. The defendant was a cotton manufacturer, and, on the 8th of October, 1864, Armitage sold to him 7000 lbs. of the plaintiff's yarn, and on the 12th of October delivered to him 1814 lbs., which were paid for on delivery. On the 14th of October, Armitage, being desirous of raising some money, applied to the defendant for the loan of £1000. The defendant refused, but agreed to purchase of him some yarn of the manufacture of one Kershaw, which he had for sale, and then advanced to him £1000. On the 19th and 20th of October, Armitage delivered to the defendant Kershaw's yarn, which did not amount in value to £1000. On the 24th of December and the 5th of January Armitage made further deliveries to the defendant of the plaintiff's yarn, in performance of his contract. On the 11th of January the defendant settled his account with Armitage, paying him in cash the sum due to him after deducting the £1000 and allowances for discount, short weight, and interest. Armitage subsequently made other deliveries of the plaintiff's yarn to the defendant, which in each case were paid for in cash on delivery. Armitage did not pay over the value of any of the goods to the plaintiff, and became bankrupt; and the present action was brought to recover such part of the price of the yarn delivered on the 24th of Decem-

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ber and the 5th of January as was not paid for by the defendant in cash.

The jury found that the defendant advanced the £1000 to Armitage on his general account, and not specially for Kershaw's yarns; and a verdict was entered for the defendant, with leave to move to enter the verdict for the plaintiff for £274 7s., or such sum as the Court should direct.

Edward James, Q. C., having obtained a rule, pursuant to the leave reserved,

Temple, Q. C., and John Edwards showed cause. The advance of £1000 amounted, at the least, to a prepayment, which is good as against the principal. *Fish v. Kempton*, 7 C. B. 687, 18 L. J. C. P. 206. The plaintiff's goods were, in fact, in course of delivery when the advance was made.

[WILLES, J. — When do you say that the £1000 became payment for these goods of the plaintiff?]

[*188] *The moment they were delivered. Even if this was not the case, there was a distinct act of appropriation when the settlement was made. *Favenc v. Bennett*, 11 East. 36 (10 R. R. 425). It could not have been necessary for the defendant to pay over the money to Armitage for the sole purpose of receiving it back again.

Kemplay (Edward James, Q. C., with him), in support of the rule. The advance of the £1000 clearly was not a payment as against the plaintiff. If he had failed to deliver any more of the yarn, he could not have been sued for money had and received. There was nothing due to the plaintiff at the time the £1000 was advanced, and a payment before delivery was not a payment in the ordinary course of business, and therefore not a payment as against the plaintiff. *Bartlett v. Pentland*, 10 B. & C. 760 (34 R. R. 560); *Underwood v. Nicholls*, 17 C. B. 239, 25 L. J. C. P. 79. In *Favenc v. Bennett*, the payment was made after the debt was due. The fact that interest was charged shows that it was treated as an advance. Neither did the settlement of accounts with Armitage make it payment. The payment must be by money, and not by a settlement of cross accounts. *Stewart v. Aberdeen*, 4 M. & W. 211. *Cur. adv. vult.*

JAN. 12. The judgment of the Court (ERLE, Ch. J., WILLES, BYLES, and KEATING, JJ.), was delivered by

KEATING, J. — This was an action brought to recover the sum of £274 7s. for goods sold and delivered. The pleas were, never indebted and payment. The facts appeared to be that the plaintiff, who traded under the name of "Paul Catterall, Son, & Co.," was a cotton spinner at Preston, and employed one Joshua Armitage, a commission agent at Blackburn, to sell yarns on his account upon a *del credere* commission as broker. The defendant, a manufacturer at Blackburn, trading under the name of "Edward Briggs & Co.," dealt with Armitage in purchasing from him as agent for the plaintiff and others, yarns marked with the initials of the parties spinning them. Previous to the 14th of October, 1864, he had purchased from Armitage yarns of the plaintiff's, and paid for them in cash, and there was no evidence of any other mode of * payment as between him and Armi- [* 189] tage before that date; on that day, the accounts between them being then balanced, Armitage applied to the defendant for a loan of £1000, which the defendant refused, but agreed to advance that amount for the purchase at an agreed price of yarns to be subsequently delivered. The defendant accordingly paid Armitage on that day £1000; and on the 19th and 21st of October deliveries of yarns of one Kershaw, to the amount of £725 13s., were made by Armitage on account of the advance. On the 24th of December and the 5th of January following, he delivered yarns of the plaintiff's to the value of £521 14s. 6d., and on the 11th of January a settlement took place by the defendant paying to Armitage the excess beyond the £1000 in cash, and so balancing the account between them to that date. The plaintiff, however, was not paid for those yarns by Armitage, who soon afterwards became bankrupt. In taking the account the defendant debited Armitage not only with the £1000, but also with interest for delay in the deliveries, as well as discount, short weights, &c. He put to his credit the yarns as delivered, without specifying the makers; but he knew which were the yarns of the plaintiff, and that Armitage sold them as agent. The jury found that the £1000 was advanced to Armitage upon a general account, and not for Kershaw's yarns specifically, that being the only question the parties desired to be so left. The verdict was entered for the defendant on the plea of payment, leave being reserved to the plaintiff to move to enter a verdict for him for the amount he claimed, — viz., £274 7s., or for such other sum as the

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Court might think fit, if the transaction between the defendant and Armitage did not prove payment to the plaintiff. A rule having been granted, cause was shown last term, and after hearing the argument and considering the case, we think the rule should be made absolute to enter the verdict for £274 7s.

That a broker or agent employed to sell has *primâ facie* no authority to receive payment otherwise than in money, according to the usual course of business, has been well established, and it seems equally clear that, if, instead of paying money, the debtor writes off a debt due to him from the agent, such a transaction is not payment as against the principal, who is no party to [* 190] the * agreement, though it may have been agreed to by the agent; see the judgment of ABBOT, Ch. J., *Russell v. Bangley*, 4 B. & Ald. 398; *Todd v. Reid*, 4 B. & Ald. 210; the authority of which, upon this point, is not affected by the correction as to a fact by PARKE, B., in *Stewart v. Aberdeen*, 4 M. & W. 224. It has also been held by this Court in the case of *Underwood v. Nicholls*, 17 C. B. 239, 25 L. J. C. P. 79, that the return to the agent of his cheque, cashed for him by the debtor a few days before, was not part payment as against the principal. "It amounts to no more," said JERVIS, Ch. J., "than the debtor seeking to discharge his debt to the principal by writing off a debt due to him from the agent, which he has no right to do." We think the present case the same in principle with *Underwood v. Nicholls*. When the plaintiff supplied his goods on the 24th of December and 5th of January, Armitage had, from the 21st of the preceding October, been in debt to the defendant to the amount of £274 7s., being the difference between the amount for Kershaw's yarns, and the £1000 advanced, and the defendant so treated it in his own account. Now the only way in which the goods so supplied were ever paid for was by writing off that amount from the £1000, and paying the balance in money, which is precisely what was decided in *Underwood v. Nicholls* not to be a good payment as against the plaintiff; and it is to be observed, it did not appear that there was any usage or course of business that would at all make it so; on the contrary, the evidence showed that all the payments, for goods delivered before and after the transaction in question, were payments in money in the ordinary way, and that the advance of the £1000 was an isolated and exceptional transaction; neither was there any proof whatever of any ratification by the

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plaintiff, who at once repudiated any authority to Armitage to receive payments for his yarns, except in money.

It was argued by the counsel for the defendant that the advance of £1000 might operate as a prepayment, and that such would be good, and for this he cited the *dictum* of WILDE, Ch. J., in the case of *Fish v. Kempton*, 7 C. B. 687, 18 L. J. C. P. 206. The case itself only decided that a set-off by the debtor of a debt due to him by a known factor would not * be good [* 191] as against the principal, but the *dictum* of WILDE, Ch. J., was referred to as distinguishing between set-off and prepayment, and suggesting that the latter would have been good.

It is unnecessary, however, to say more in the present case than that the *dictum* of the CHIEF JUSTICE applied to the case of a payment to the factor as part of the particular transaction, and which the principal could treat at the time as being made to his agent for him, whereas, in the present case, the payment was not made on account of the plaintiff's yarns, so as that the plaintiff could have called upon Armitage to account for the money, £1000, or any part of it, as received to his use. Had he done so, the answer of Armitage would have been that, although a prepayment in which the plaintiff had a possible interest, yet, inasmuch as the whole might have been exhausted in payment of Kershaw's or other yarns of the agreed quality, the plaintiff would have no right to treat it as a payment to or for him until a subsequent act of appropriation, which in substance is nothing more than writing-off a debt, should take place. It is unnecessary, therefore, to express any opinion upon that *dictum* as to the law or usage as applied to factors, as we do not think it applies to the present case.

It is right to notice, though it was not pressed in argument as creating a distinction, that Armitage acted under a *del credere* commission from the plaintiff. We think this makes no material difference as to the question raised in the case. The agent, selling upon a *del credere* commission, receives an additional consideration for extra risk incurred, but is not thereby relieved from any of the obligations of an ordinary agent, as to receiving payments on account of his principal.

The rule, therefore, to enter a verdict for the plaintiff for £274 7s. will be absolute.

Rule absolute.

(IN THE EXCHEQUER CHAMBER.)

The defendant having appealed from the above judgment, and the appeal having been argued :

[L. R. 2 C. P. 370] KELLY, C. B. — The Court are inclined to think that this case involves a question of fact, which has not been left to the jury, and without a decision of which the judgment of the Court on either side would be unsatisfactory. On more than one occasion the view has been taken by very learned Judges that there is in cases such as this a question for the jury. Thus, in *Stewart v. Aberdeen*, 4 M. & W. 211, Lord ABINGER said : " It must not be considered that by this decision the Court means to overrule any case deciding that when a principal employs an agent to receive money and pay it over to him, the agent does not thereby acquire any authority to pay a demand of his own upon the debtor by a set-off in account with him. But the Court is of opinion that where an insurance broker or other mercantile agent has been employed to receive money for another in the general course of his business, and when the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in accounts with the debtors, with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied, but it must be understood that where an account is *bonâ fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor according to the meaning and intention and with the authority of the principal." In *Streeting v. Pearce*, 9 C. B. (N. S.) 534, MARTIN, B., having stated the facts of a case very similar to the present one, *Butterworth v. Colesworth*, said : " In strictness, I think the question was one of fact and not of law."

I should be extremely sorry to interfere with the general understanding of the bench and the bar, that a new trial will not be granted on the ground that a question has not been left to the jury, when the party interested in it has not asked the Judge to leave it to them. But in this case the jury have found that the payment by the defendant was made to Armitage on his general account, and not with reference to Kershaw's yarns, and I think

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* they could not have come to that conclusion if they [* 371] had not known that it was a usual practice for payments to be made, as in this case, from time to time, sometimes to a smaller and sometimes to a larger amount than was actually due at the time. It is because I am inclined, and more than inclined, to believe that such was the intention of the jury, and yet sitting here I cannot legally infer that it was so, that I think the justice of the case will be best met by our ordering that there be a new trial.

CHANNELL, B., BLACKBURN, J., MELLOR, J., and PIGOTT, B., concurred. *Judgment reversed, and a new trial ordered.*

ENGLISH NOTES.

The cases upon the question whether an insured is bound by a usage at Lloyds for the broker to receive payments by credits in account with the underwriter, are commented on in the notes to Nos. 17-19 of "Insurance," 13 R. C. 464, 465. The rule is that the agent employed to receive money does not thereby acquire any authority to set off a demand of his own upon the debtor; but this rule does not apply where there is a general course of business *known to the insured* for the agent to keep running accounts with the principal and with the debtors, and to credit the principal with sums received by credits in account with the debtors, and where accounts are settled according to that known usage. *Bartlett v. Pentland* (1830), 10 B. & C. 760, 34 R. R. 560; *Stewart v. Aberdeen* (1838), 4 M. & W. 211, 1 H. & H. 284, 7 L. J. (N. S.) Ex. 292; *Sweeting v. Pearce* (Ex. Ch. 1861), 9 C. B. (N. S.) 534, 30 L. J. C. P. 109, 5 L. T. 79, 9 W. R. 343.

Where a broker on the stock exchange has paid to a solicitor who instructed him (and whom he knows to be acting as agent) the proceeds of stock sold, in accordance with an alleged custom of the stock exchange that a broker is bound only to recognize the person actually employing and instructing him, such payment is not payment as between the broker and the client, who has no notice of the alleged custom. *Pearson v. Scott* (1878), 9 Ch. D. 198, 47 L. J. Ch. 705, 38 L. T. 747, 26 W. R. 796.

A payment to an agent by a crossed cheque which is honoured in due course has been held equivalent to a payment in cash so as to be a payment to the principal, although the proceeds have been intercepted by the bankers of the agent, who had overdrawn his account. *Bridges v. Garrett* (Ex. Ch. 1870), L. R. 5 C. P. 451, 39 L. J. C. P. 251, 22 L. T. 448, 18 W. R. 815.

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But where an auctioneer (contrary to the printed condition accepted as cash in payment for goods sold a bill of exchange at three months, which he discounted for cash, and which was eventually duly honoured at maturity, — and, after the auctioneer had discounted the bill and before it matured, the principal (vendor) gave the purchaser notice not to pay any money to the auctioneer: — it was held that the purchaser could not plead payment in an action by the vendor. *BLACKBURN, J.*, at the same time expressed the opinion that if the bill had matured (and been duly paid) before the authority to the auctioneer to receive payment had been revoked, then the payment by the bill would have been equivalent to money handed to the auctioneer. *Williams v. Evans* (1866), L. R. 1 Q. B. 352, 35 L. J. Q. B. 111, 13 L. T. 753, 14 W. R. 330.

AMERICAN NOTES.

The proposition that an agent authorized to receive payment has *primâ facie* no authority to receive it otherwise than in money, is sustained by numerous American authorities.

“That the power of a collecting agent by the general law is limited to receiving for the debt of his principal that which the law declares to be legal tender, or which is by common consent considered and treated as money, and passes as such at par, is established by all the authorities. The only condition they impose upon the principal, if anything else is received by his agent, is, that he shall inform the debtor that he refuses to sanction the unauthorized transaction within a reasonable period after it is brought to his knowledge.” *Ward v. Smith*, 7 Wallace (U. S.), 447, 452.

Thus, the agent cannot accept in payment the promissory note of the debtor. *Lochenmeyer v. Fogarty*, 112 Illinois, 572; *Scott v. Gilkey*, 153 Illinois, 168; *McCormick Harvesting Machine Co. v. Breen*, 61 Illinois App. 528; *Miller v. Edmonston*, 8 Blackford (Ind.), 291; *Corning v. Strong*, 1 Indiana, 329; *Moore v. Pollock*, 50 Nebraska, 900; *Holt v. Schneider*, 77 Northwestern Rep. 1086 (Neb. 1899); *McCulloch v. McKee*, 16 Pennsylvania State, 289. Nor his check. *Western Brass Manufacturing Co. v. Maverick*, 4 Texas Civil App. 535. Nor his draft on a third party. *Drain v. Doggett*, 41 Iowa, 682. Nor a note of, or other claim against, a third party. *Langdon v. Potter*, 13 Massachusetts, 319; *Kenny v. Hazeltine*, 6 Humphreys (Tenn.), 62; *Anderson v. Boyd*, 64 Texas, 108; *Smock v. Dade*, 5 Randolph (Va.), 639; *Wilkinson v. Holloway*, 7 Leigh (Va.), 277; *Spence v. Rose*, 28 West Virginia, 333. Nor, in general, property of any sort except money. *Mudgett v. Day*, 12 California, 139; *Rodgers v. Peckham*, 120 California, 238; *Kirk v. Hiatt*, 2 Indiana, 322; *Aultman v. Lee*, 43 Iowa, 404; *Columbia Phosphate Co. v. Farmers' Alliance Store*, 25 Southeastern Rep. 116 (S. Car. 1896); *Wright v. Daily*, 26 Texas, 730. See, further, the cases collected in *Mechem on Agency*, sect. 375.

Of course an agent or attorney empowered to collect a claim cannot receive payment by a release of his own debt to the debtor. *Gullett v. Lewis*, 3 Stewart (Ala.), 23; *Stetson v. Briggs*, 114 California, 511; *Bostick v. Hardy*,

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30 Georgia, 836; *Beris v. Heflin*, 63 Indiana, 129; *McCarver v. Nealey*, 1 G. Greene (Iowa), 360; *Smith v. Morrill*, 39 Kansas, 665; *Deatherage v. Henderson*, 43 Kansas, 684; *Parsons v. Webb*, 8 Maine, 38; *Western White Bronze Co. v. Portrey*, 50 Nebraska, 801; *Wilkinson v. Holloway*, 7 Leigh (Va.), 277.

In *Wilkinson v. Holloway*, *supra*, it was held that, where an attorney to collect discounted from the debt one he himself owed the debtor, and took for the balance the debtor's assignment of a bond of third persons, the creditor was not bound by such an arrangement.

In *Wiley v. Mahood*, 10 West Virginia, 206, 220, the Court said: "An attorney-at-law occupies a position of trust, and his duties, and the extent of his powers, have been very clearly defined. At one time it was doubted whether he had any right to receive the money of his client: but it has been long ago definitely settled that where an attorney has received a claim for collection that a payment to him of the money due to his client on the claim is a payment to the client himself, as far as the debtor is concerned. But without special authority, he has no right to receive anything from the debtor except money. If the attorney owes the debtor of his client an amount equal to the claim which he has for collection, the law will not permit the attorney to pay his own debt by giving up the claim of his client."

But in *British & American Mortgage Co. v. Tibbells*, 63 Iowa, 468, it was held that, where the agent is a bank of deposit, it may receive its own certificates of deposit as money, and the principal will be bound by such payment, and the debtor discharged, even though the bank soon afterwards becomes insolvent and never remits to its principal. Cf. *Francis v. Evans*, 69 Wisconsin, 115.

Where the agent has a lien upon the whole or a part of the proceeds of the debt, or is entitled to a commission out of them, to that extent he may receive payment by setting off his own debt to the debtor. *Harlow v. Sparr*, 15 Missouri, 184; Story on Agency, 9th ed. sect. 408.

While, as above stated, an agent cannot bind his principal by accepting in payment claims against third parties, yet it has been held that as soon as he receives money on the claims thus put in his hands by the debtor, it is a payment to that extent, less his fees for collecting, upon the claim of his original principal. *Wiley v. Mahood*, 10 West Virginia, 206.

So, in *Smith v. Lamberts*, 7 Grattan (Va.), 138, after an attorney who had received a claim for collection had obtained a judgment on it, the debtor put into his hands the bond of a third person for about the amount due; and the attorney gave him a receipt in which he acknowledged receiving the bond, and agreed to bring suit on it, and after paying his own fees, to apply the balance to the credit of the judgment. He received the money, but did not pay any part of it to the creditor. The Court held this was a valid payment by the judgment debtor.

And in *Harbach v. Colvin*, 73 Iowa, 638, it was held that, while an agent or attorney has not, in the absence of special instructions, any authority to receive anything but money in payment of a claim held by him for collection, yet, where he receives a bank check as such payment, and obtains credit on his account for the amount of the check at the bank where he deposits it, and the money is paid him when he chooses to draw it out, and the bank on

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which the check is drawn pays it when presented, this is equivalent to a payment in money and binds the principal.

But in *Kenny v. Hazeltine*, 6 Humphreys (Tenn.), 62, it was held that where an attorney receives notes or evidences of debt in payment of a claim placed in his hands for collection, not only is the claim not thereby paid, but the money collected on the obligations is at the debtor's risk, until appropriated or applied to the satisfaction of the claim.

While an agent cannot receive payment of his principal's claim in depreciated bills [*Ward v. Smith*, 7 Wallace (U. S.), 147], it seems that he is not restricted to legal tender. Thus in *Rodgers v. Bass*, 46 Texas, 505, where it was held that, in Texas in 1862 an agent to collect could receive Confederate States treasury notes, unless forbidden by his principal, the Court said, at p. 516: "The legal inference from the authority given an agent to collect a debt is, that he is authorized to receive money, current and at par with coin, usually received in like transactions by the community in general where the debt is paid. The agent, therefore, has no authority to sell, or barter and exchange the note to the debtor, or any one else, for drafts, bills of exchange, or any kind of personal or real property. The inference to be deduced from the general authority given the agent to collect, is, that he must do so in money. But in what kind of money shall this be done? Is it to be understood that, in such cases, the word "money" is to be taken in its most restricted and limited sense, and should be held to refer to such gold and silver coin, or notes and bills, as are, by the Constitution and laws, declared to be legal tender; or is it to be taken and interpreted according to its popular use, and held to authorize the receipt of currency and bills recognized in general circulation where the debt is to be paid as money? We answer, in general, unless the language of the power is qualified or restricted, it should be held to import the latter. It therefore shows that such an agent is authorized by the power to receive whatever is generally recognized and treated in business transactions as money, and is at par, and readily convertible into money, made by law a legal tender, for the payment of debts, or where the discount upon it is so little as to have no material effect upon its general circulation and value." See also *Robinson v. International Life Assurance Society*, 42 New York, 54.

But if the fact that certain notes are in general circulation as money is not known to the principal, no authority to the agent to receive payment therein can be implied. *Graydon v. Patterson*, 13 Iowa, 256.

As to the authority of an agent, during the Civil War, to receive payment in Confederate money, see further *Hendry v. Bentisa*, 37 Florida, 609; *Waterhouse v. Citizens' Bank*, 25 Louisiana Annual, 77; *Harper v. Harvey*, 4 West Virginia, 539; and a note in 15 American Decisions, 131.

No. 7. — Valpy v. Oakeley, 16 Q. B. 941. — Rule.

No. 7. — VALPY v. OAKELEY.

(Q. B. 1851.)

RULE.

WHERE a contract is to pay by bill, and a bill is given accordingly, it is a *conditional payment*. That is to say while the bill is running it is assumed that payment has been made. But as soon as the bill is dishonoured, the payee under the contract is placed in the same position as if no payment had been made at all.

Valpy v. Oakeley.

16 Queen's Bench, 941-951 (s. c. 20 L. J. Q. B. 380, 16 Jur. 38).

Payment by Bill. — Conditional Payment. — Dishonour of Bill.

Defendant contracted with plaintiffs to sell them 500 tons of iron, [941] to be delivered in parcels at stated times, and paid for by bills at three months each, which were accordingly accepted by plaintiffs, and handed to defendant. The times for delivery of the iron elapsed while the bills were current. Both bills were dishonoured; and plaintiffs afterwards became bankrupt. Part of the iron was never delivered. The assignees of plaintiffs brought a special action on the contract, claiming the entire value of the iron not delivered.

Held, that they could recover only the difference, if any, between the contract price of the iron, and the market price at the time of the breach of contract to deliver; and that the giving of the bills made no difference in this respect, as they had been dishonoured before action brought.

Assumpsit. The first count was upon a contract, made before the bankruptcy, for the sale of 500 tons of pig iron by the defendant to the bankrupts at the price of £4 per ton, to be delivered at Chester in parcels of 100, 200, and 200 tons, at certain times, and to be paid for by the bankrupts accepting bills to be drawn by defendant on them for the price of such parcels respectively: and it was alleged by the first count that, although the times had elapsed, and the bankrupts were at all times after the making of the said contract ready and willing to receive the said iron, and to pay for the same (notice, &c.), and although defendant, at the times, respectively, when the iron should have been delivered and paid for according to the contract, represented to the bank-

[* 942] rupts * that the iron was delivered, and although the bankrupts had accepted the bills of the defendant for the full amount of the price, and although part of the iron had been delivered, yet default had been made in delivering the residue. There was a second count, on a similar contract, but on which nothing now turns.

Pleas to the first count. 1. Non-assumpsit. 2. That the bankrupts were not ready and willing to accept, &c. 3. That defendant did not represent, &c. Conclusions to the country. Issues thereon. There were other pleas to this count, which it is unnecessary to state.

On the trial, before CRESSWELL, J., at the Chester Spring Assizes, 1850, a verdict was taken for the plaintiffs for £2000, the damages laid in the declaration, subject to the opinion of this Court on a special case, the material parts of which are as follows:

The bankrupts, Messrs. Boydell & Roper, in and previous to the year 1846, were the owners of extensive iron works near Dudley in the county of Worcester, and carried on business thereat, and also as dealers in iron under the name of "The Oak Farm Iron Company;" and the defendant was an iron master having also extensive iron works in Flintshire.

The case then set forth documentary and other evidence as to the contract referred to in the declaration, which was made, according to the evidence of the first witness, in July, 1847, "for 500 tons at £4 per ton, to be delivered, 100 tons the first month, 200 tons each succeeding month, to be drawn for on the first of each month."

In July, August, and September, 1847, iron was delivered by the defendant to the bankrupts, and invoices (for 100, 200, [* 943] and 200 tons) were sent on each occasion. * Accompanying each invoice the defendant sent to the bankrupts a bill, drawn by defendant on them, for the price of the parcel mentioned in the invoice, which bills the bankrupts accepted and returned to the defendant. The bill for the price of 100 tons, which bore date 2nd August, 1847, for £400, was duly paid at maturity. The others, for £800 each, dated respectively September 1st and October 1st, 1847, each at three months, were not paid.

Boydell & Roper were compelled to call a meeting of their creditors on the 27th November, 1847; and a fiat in bankruptcy issued against them, 11th February, 1848.

No. 7. — *Valpy v. Oakeley*, 16 Q. B. 943-945.

Before the bankruptcy, defendant had indorsed one of the bills of exchange for £800 to the Royal Bank of Liverpool, who were the holders thereof for value, and subsequently proved the same under the fiat, but never received any dividend.

The defendant was the holder of the other bill for £800 at the time of the bankruptcy; and he subsequently proved the same under the fiat; but, after the commencement of this action (23rd February, 1850), such proof was expunged by the commissioner on defendant's application. He never received any dividend.

By a correspondence subsequent to the bankruptcy, which the case set forth, it appeared that, in February, 1849, the solicitors to the assignees wrote to the defendant, stating that about 300 tons of the iron for which the acceptances were given had never been delivered, and requiring delivery.

* It was admitted by the defendant, on the trial, that [* 944] there had been a deficiency of iron to the extent of 185 tons, 10 cwt.; but it was contended on his part that there was not any such evidence as would support the special contract set out in the declaration, and, even if that were proved, that the plaintiffs were entitled to only nominal damages. It was further contended that the defendant had proved his pleas, particularly the 2nd and 3rd, and that he was entitled to have a verdict entered for him on those pleas. The plaintiffs contended that there was sufficient evidence to warrant the jury in finding that the contracts, as set out in the declaration, were made; and that the plaintiffs as assignees were entitled to recover from the defendant the full price of the iron which had been withheld from the bankrupts.

The Court was to be at liberty to draw such inferences of fact as a jury might have drawn.

The questions for the opinion of the Court were: Whether, under the circumstances stated in the case, the jury would have been warranted in finding that the contracts set forth in the declaration, or either of them, were made: And, if the Court should be of that opinion, and that the plaintiffs were entitled to judgment in the action, then a verdict was to be entered for the plaintiffs for such damages as the Court should direct: but, if the Court should be of the contrary opinion, then a verdict * was [* 945] to be entered for the defendant on the plea of non-assumpsit. The Court was to direct how the other issues were to be entered.

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Hugh Hill, for the plaintiffs.¹—First: The contract, as relied upon, is made out by the evidence. (It is not thought necessary to report the argument on this point, which was given up by Welsby for the defendant, on an intimation of opinion from the Court.) Secondly, the measure of damages must be the same as if the action had been brought immediately on the expiration of the three months in which the iron was to be delivered. The dishonour of the bills could make no difference. The bankrupts were entitled, on giving the bills, to a full delivery of the iron; and, if an action had been brought in October, 1847 for the default, there could have been no set-off on account of the bills, this being a special action in which the damages are unliquidated. *Colson v. Welsh*, 1 Esp. 378. In *Hill v. Smith*, 12 M. & W. 618; K. and M. paid in money at their bankers' for the specified purpose of providing for certain bills drawn upon the bankers by K. and M. The bankers, instead of so applying it, placed the sum to the credit of their own account with K. and M., who were in their debt; and, the bankers not accepting the bills, they remained unpaid. K. and M. became bankrupts; and, in an action of assumpsit by the assignees against the bankers for not accepting, it was argued that the plaintiffs could recover only by nominal [* 946] damages, because, * if the bankers had accepted and paid the bills, the estate would have been liable to them for the amount paid, and it was not, therefore, really damaged by the non-payment. But the Court of Exchequer held them liable, for breach of contract, to the full amount of the money paid in. And in *Alder v. Keighley*, 15 M. & W. 117, under similar circumstances the same Court held that the measure of damages for the breach of contract was the amount which the bankrupt would have had to receive if he had continued solvent and the contract had not been broken. The present action, like those, is on breach of contract. The bankrupts, having given bills, were not in the situation of a vendee who still has the purchase money in his hands, and, if the goods are not delivered, may purchase others at the market price. That the bills were not paid can be ground only for a cross claim. *Dutch v. Warren*, 2 Burr. 1010, shows, both that a special action lies for non-performance of the contract, though if money had passed, an action would likewise have lain for money had and

¹ The case was argued on May 2nd and 6th. Before Lord CAMPBELL, Ch. J., PATTERSON, WIGHTMAN, and ERLE, JJ.

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received; and also that the damages must be estimated as at the time when the contract should have been performed.

Welsby, *contrà*. — It is true that the ultimate loss to the estate is not the proper criterion of the damage. But the defendant stood in the situation of an unpaid vendor; and the measure of damage was the difference between the contract price of the goods and the price at which the vendees might have bought in the market at the time when the contract was broken, or within a *reasonable time after. And it does not appear [* 947] in this case that there was any difference. *Hill v. Smith*, 12 M. & W. 618, was a case distinguishable from the present. There the bankers who were defendants had been guilty of a gross fraud and misapplication, by which the bankrupts and their assignees were deprived at once of a sum of money paid into the bank and to which the bankrupts were at that time entitled. So in *Alder v. Keightley*, 15 M. & W. 117, the defendant had appropriated a sum of money, proceeds of a bill, which sum the bankrupt was at that time entitled to, and which the assignees, as representing him, might justly claim afterwards. Here, at the time of the breach of contract, nothing had occurred but the giving of the bills; and this cannot affect the case, as the bills proved valueless. It is admitted on the other side that there can be no set-off on account of the bills: the only effectual remedy the defendant can have is by reducing the claim of the vendees to the loss actually sustained by them, they having in reality paid nothing; for that was the state of things at the time of the bankruptcy, to which the Court must look. [PATTESON, J. — As soon as the bankrupts discovered that the goods were not fully delivered, they were entitled to sue. You say that, if the discovery be not made till the bills are dishonoured, nothing can be recovered.] That is so. In *Dutch v. Warren*, 2 Burr. 1010, the decision turned merely on the measure of damages, without reference to bankruptcy or non-performance of contract. [Lord CAMPBELL, Ch. J. — You say that the case here would have been plain if the bankrupts had promised to pay by bills and had given none; and that the fact, as proved, is *substantially the [* 948] same.] It is. If the damages given were more than nominal, the plaintiffs would, in effect, recover upon the dishonoured bills. It is conceded that the finding on the second and third issues must be for the plaintiffs.

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Hill, in reply. — The defendant is not in the same situation as if no bills had been given. Here is an entire contract for 500 tons of iron, to be paid for by three bills. One bill is honoured; another is proved against the estate of the bankrupts; the third is in the hands of the defendant, who elected to prove, though he has since, without the concurrence of the assignees, caused the proof to be expunged. Nothing has been paid on the latter bills; but there may be a dividend hereafter. If this action had been brought while the bills were current, the vendees would have been entitled to the value of the undelivered iron: and the case here is the same. To resist the claim of the vendees, the defendant should have been able to place them *in statu quo*; this being impracticable, the defendant cannot avail himself of the bills either as a defence or in mitigation of damages. [PATTESON, J. — The bills could not have been returned, because part of the iron had been delivered.] That is so. Supposing that the bankrupts could be sued upon the bills after the determination of this cause, they could not in that action have the benefit of any allowance now made in damages by reason of the dishonour. The plaintiffs are clearly entitled to recover in this action for damages; *Marzetti v. Williams*, 1 B. & Ad. 415 (35 R. R. 329); and *Thorpe v. Thorpe*, 3 B. & Ad. 580, and *Colson v. Welsh*, 1 Esp. 378 (cited [* 949] in * *Hill v. Smith*, 12 M. & W. 618), show that the extent to which they can recover may depend on the form of action. [WIGHTMAN, J. — If the bills were dishonoured while the iron was *in transitu*, could not the vendor stop the transit? Lord CAMPBELL, Ch. J. — The transit continuing till the goods are all actually received, though after the time bargained for.] The question of stoppage *in transitu* turns upon equitable rights, which may not determine the present case.

Lord CAMPBELL, Ch. J. — The plaintiffs are entitled to recover on the issue upon non-assumpsit. It is admitted that there was evidence of a contract; and we have the powers of a jury. The question then remains as to the amount of damages: and I think these must be only nominal. Justice requires such a decision; and I rejoice that the law confirms it. I do not find fault with *Hill v. Smith*, 12 M. & W. 618, and *Alder v. Keighley*, 15 M. & W. 117, or with any other authority cited. But we must here look to the time of the bankruptcy. At that time bills given for the iron

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were outstanding. While current, they were payment. When dishonoured they were waste paper; it was as if no bill had been given. It is allowed that, if the contract had been to pay by bills, and the vendees had given no bill, they could not have recovered the full value of the iron not delivered, but only the difference between the market price at the time of the breach of contract to deliver, and the price contracted for. It would be as if the payment had been to be made in ready money, and no money had been paid. The parties here are in the same situation as if no bills had been given, or the contract had not been to pay in bills. And, there *being no difference shown between the mar- [*950] ket price at the time of default and the contract price, the vendees could have recovered only nominal damages; no more, therefore, can the assignees. The case rests upon the principle of stoppage *in transitu*; a right which may be exercised where bills have been given for the goods, and are dishonoured.

PATTESON, J. — The question here is, whether the assignees can recover the value of the iron not delivered. No difference between market and contract price has been shown. Bills were given, but had been dishonoured before the bankrupts enforced their remedy for the non-delivery of the goods. Then the case is the same as that of an ordinary action for non-delivery where the price of the goods has not varied. If the bills had been current when the action was brought, the case would have been different. As soon as the bills became payable the situation of the parties was altered: and the position of the assignees is the same as that of the bankrupts. The cases in the Exchequer which have been referred to were not between vendors and vendees, but were cases in which money, or an order for money, had been given for a specific purpose, which the party receiving had undertaken to fulfil, but had not done so; and the Court held that such party was bound to perform his contract, and that the assignees might recover for the non-performance, because the bankrupt might. That is not so here.

WIGHTMAN, J. — There was nothing here to take away the lien of an unpaid vendor upon the goods not yet delivered. While the bills were running, the case would *be differ- [*951] ent; but here the bills were dishonoured before there had been a delivery of the goods in question. Then the vendor's lien

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attached; it did not dissolve the original contract; but the vendees could not recover the value of the goods: the only question was, whether there had been any difference between the market and the contract price.

ERLE, J., concurred,

Verdict to be entered for plaintiffs, with 1s. damages.

ENGLISH NOTES.

The case must be distinguished where the debtor is referred by his creditor for payment to a third party, who is ready to pay him in cash; but where the debtor instead elects to take a bill, having some months to run, upon which the debtor is not liable, this transaction discharges the debtor, and his liability is not revived by the dishonour of the bill. The transaction is the same as if the debtor had been paid in cash, and had invested the money on the security of the parties to the bill. *Smith v. Ferrend* (1827), 7 Barn. & Cress. 19. See a similar principle applied in *Thompson v. Percival* (1834), 5 B. & Ad. 925.

AMERICAN NOTES.

“Where a bill of exchange, or a promissory note, is taken in payment, the rule of law is, that it does not operate as an absolute payment or extinguishment of the debt, unless by the express agreement of the parties: but only as a conditional payment, operating to suspend the right of the party to sue for the debt until the maturity thereof, and to restrict his right, as to indorsers, to that of a simple holder of the note or bill. The rule is, however, founded upon a mere presumption of the supposed intention of the parties, and may be rebutted by proof of a contrary intention, growing out of an express agreement, or one arising, by implication, from the circumstances of the case. Where there is no such agreement, the holder's right to sue on the original contract is in abeyance, during the currency of the note or bill: but upon dishonor thereof, his right revives. The holder is, however, bound to perform all the duties growing out of his position as holder, or indorser, or he cannot recover. But in some of the American states, the doctrine obtains, that the taking a [negotiable] promissory note or bill of exchange, is *prima facie* to be deemed an absolute payment, although this presumption may be rebutted: the ordinary rule of the common law, that a promissory note or bill of exchange is *prima facie* a conditional payment only, being entirely reversed.” Story on Sales, 4th ed. sect. 219.

In all the American states except Maine, Massachusetts, Vermont, Indiana, and Louisiana, it seems that the English rule, to the effect that a bill or note given by a debtor to his creditor is, *prima facie*, only conditional payment of the debt, is followed. In the states named, on the other hand, the presumption is that the bill or note is taken in absolute payment. The

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American cases on the subject, which are very numerous, are collected in Bennett's note to Benjamin on Sales, 7th ed. p. 773; Daniel on Negotiable Instruments, 4th ed. ch. xxxix.; Randolph on Commercial Paper, 2nd ed. ch. xli.; 2 Ames's Cases on Bills and Notes, p. 571, n. 2; 18 Am. & Eng. Encycl. of Law, 1st ed. 167-184.

"As an original question, something perhaps might be said in support of the view that receiving a note from a debtor should have the same effect as receiving a specialty, and discharge the prior obligation. But it has long been well settled in England, and in most American jurisdictions, that merely taking a note is presumptively only a conditional payment of a pre-existing debt. While the note runs, the right of action on the original claim is suspended, but it revives if the note is not paid at maturity. In a few states — Maine, Vermont, Massachusetts, Indiana, and Louisiana, — a contrary presumption prevails, to the effect that the execution of a note is an absolute discharge of prior indebtedness. Everywhere these presumptions are rebuttable by evidence; if the parties show an intention that the debt shall or shall not be completely extinguished by the note, such intention will be given effect." 10 Harvard Law Review, 59.

Late American cases bearing on the point are *Lawrence v. United States*, 71 Federal Rep. (U. S.), 228; *Lowenstein v. Bresler*, 109 Alabama, 326; *Medley v. Specker*, 58 Illinois App. 157; *Davis & Rankin Building & Manuf. Co. v. Montrose Butter & Cheese Co.*, 59 Illinois App. 573; *Davis & Rankin Building & Manuf. Co. v. Vice*, 15 Indiana App. 117; *Orner v. Suttley Mfg. Co.*, 18 Indiana App. 122; *Rhodes v. Webb-Jameson Co.*, 49 Northeastern Rep. 283 (Ind. 1898); *Woodward v. Holmes*, 67 New Hampshire, 194; *Milbury v. Heitzberg*, 55 New York Supp. 743; *Johnston v. Barrills*, 27 Oregon, 251; *Cushwa v. Improvement, &c. Association*, 32 Southeastern Rep. 259 (W. Va. 1898).

No. 8. CAMIDGE *v.* ALLENBY.

(K. B. 1827.)

RULE.

WHERE a debtor pays in bills or notes, not his own but of third parties, the creditor retaining the instruments must use due diligence to obtain payment: and in default will be treated as having been paid, *i. e.* assumed either to have accepted the instruments as cash, or to have discharged the debtor by his laches.

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6 Barn. & Cress. 373-385 (30 R. R. 358).

Payment. — Bills of Third Parties. — Election of Payee.

[373] In an action for the price of goods, it appeared that the same were sold at York on Saturday, the 10th of December, 1825, and on the same day, at three o'clock in the afternoon, the vendee delivered to the vendor, as and for a payment of the price, certain promissory notes of the bank of D. and Co. at Huddersfield, payable on demand to bearer. D. and Co. stopped payment on the same day at eleven o'clock in the morning, and never afterwards resumed their payments: but neither of the parties knew of the stoppage, or of the insolvency of D. and Co. The vendor never circulated the notes, or presented them to the bankers for payment: but on Saturday, the 17th, he required the vendee to take back the notes, and to pay him the amount, which the latter refused: *Held*, under these circumstances, that the vendor of the goods was guilty of laches, and had thereby made the notes his own, and, consequently, that they operated as a satisfaction of the debt.

Assumpsit. The declaration contained counts for goods sold and delivered, and the common money counts. Plea, non-assumpsit. At the trial before HULLOCK, B., at the York Lent Assizes, 1826, a verdict was found for the plaintiff for £24, subject to the opinion of this Court on the following case:—

This action was commenced to recover the sum of £24 alleged to be due from the defendant to the plaintiff for a quantity of corn sold and delivered by the plaintiff to the defendant at York, in the morning of Saturday, the 10th day of December, 1825.

[* 374] On the same day, at *three o'clock in the afternoon, the defendant delivered to the plaintiff at York, and the latter then and there received as and for a payment of the price of the corn, four promissory notes for £5 each, and four such notes for £1 each, of the bank of Messrs. Dobson and Sons, bankers at Huddersfield, in the county of York. The notes were in the following form, and the defendant's name was not written upon them:—

“ No. _____ Huddersfield Old Bank £5.

“ I promise to pay the bearer on demand £5 value received, 1st day of July, 1823.

“ Entered, &c. _____ For John Dobson and Sons.

“ £5. _____ . W. DOBSON.”

At eleven o'clock in the forenoon of the same 10th of December, Dobson and Sons stopped payment, having on the same morning

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and up to that hour paid all demands made upon them. They never afterwards resumed their payments, and shortly afterwards became bankrupts, and the plaintiff never received any part of the amount due on the notes. Huddersfield is distant from York about forty miles, and from Laythorn, the plaintiff's residence, fifty-two miles. At the time when the above notes were paid by the defendant to the plaintiff, neither of them knew that Dobson and Sons had stopped payment or were insolvent. The plaintiff never circulated the notes, nor did he ever present them to Dobson and Sons, the makers, for payment; but on Saturday, the 17th of the same month of December, the plaintiff required the defendant to receive back the notes, and to pay him the amount of them, which the defendant then and ever since has refused to do.

Dodd, for the plaintiff. — The plaintiff is entitled to [375] recover the price of his corn, unless he has by laches made the notes his own. It will be contended that he has done so, first, by not having presented the notes for payment, secondly, by not having offered to return them to the defendant earlier than he did. But presentment for payment was not necessary in this case, because the defendant was not a party to the notes, and cannot, under the circumstances, be damnified by the neglect to present them. This case differs from the several cases where bankers' notes having been taken before the bankers had stopped, presentment has been held to be necessary within a reasonable time after taking them. Here the notes were taken after the bankers had stopped, and they never resumed their payments. The defendant, therefore, cannot have been prejudiced by reason of the notes not having been presented for payment. If an action upon the notes had been brought against the bankers, or if the defendant had been an indorser, in either case it would have been necessary to aver and prove presentment for payment. But here the action is not brought upon the notes, nor is the defendant a party to them, and therefore he cannot insist on the want of presentment as a defence to this action. The distinction seems to be between persons merely passing bills or notes without being parties to them, and drawers and indorsers who are parties to them. In *Warrington v. Furber*, 8 East, 242, the vendee of goods having accepted a bill of exchange for the price, and becoming bankrupt before the bill was due, it was held that a guarantee of the acceptance who paid the * vendor the amount of [* 376]

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the bill after the bankruptcy of the vendee, might recover the money from the latter without proving that any presentment was made to the acceptor before such payment by the guarantee, and that upon the ground that the liability not being upon the bill itself, but upon the guarantee, a presentment to the bankrupt acceptor was unnecessary. That case is an authority to show that a person who is not a party to a bill cannot complain of laches or want of notice unless it has done him an actual prejudice; and *Springard v. Bowes*, 5 M. & S. 62 (17 R. R. 274), also shows that a person who is not a party to a bill cannot complain of laches in not giving him notice of dishonour by the acceptor, as he might do if he were a drawer or indorser; and *Murray v. King*, 5 B. & Ald. 165, is to the same effect. In *Phillips v. Astling*, 2 Taunt. 206 (11 R. R. 547), the want of presentment was held to be a good defence to an action brought upon a guarantee given for the price of goods to be paid for by a bill; but this was on the ground that the acceptor at the time when the bill became due was solvent. In *Holbrow v. Wilkins*, 1 B. & C. 10 (25 R. R. 285), the plaintiff sold goods for the price of which the vendees accepted a bill, and the defendant guaranteed half the amount; but before the bill was due the vendees became insolvent, of which the defendant was then informed, and also that the plaintiffs looked to him for the sum which he had guaranteed. The bill was not presented for payment, and in an action brought against the defendant as guarantee, it was held that the want of presentment was no defence to the action. That is an authority to show, that in an action against a guarantee not party to a bill or note, presentment for payment is unnecessary when the acceptor [* 377] * or maker is insolvent at the time the bill becomes due.

These several authorities establish that the want of presentment is no defence in this action, the defendant not being a party to the bill, and not being actually damaged by the neglect to present. The defendant here merely passed the notes to the plaintiff in payment of a debt: he did not transfer them to the plaintiff as indorsee: he may be considered, therefore, in the light of a mere guarantee of the debt. As indorser he would have been liable only according to the usage and custom of merchants, and in that case a neglect to present would be a breach of the obligation imposed by the law merchant on the party taking the bill, to do all that is necessary to obtain payment from the acceptor, and

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to give due notice to the drawer and indorsers. The statute of 3 & 4 Ann. c. 9, s. 7, does not assist the defendant, since its terms do not apply to notes payable to bearer, but to bills of exchange only. It may be conceded that if the bankers had not stopped before the time when the notes ought in due course to have been presented, the holders would have been guilty of laches by not having presented them; but here the bankers had stopped even at the very time when the notes were paid to the plaintiff. Such notes pass from hand to hand like cash, and it would be highly inconvenient to require every person taking them after the stoppage of a bank to send them from any distance for presentment, when such presentment has become by the stoppage useless and nugatory. Then as to the second point, there could be no legal obligation on the plaintiff to return the notes to the defendant any further than as the returning of them might operate as notice to the defendant that the makers had refused payment. It was the bounden duty of the *defendant to take notice [* 378] that the bankers had stopped payment; for a person who passes bankers' notes to another must be considered impliedly to undertake at the time when he passes them, that the makers of the notes are then solvent and in condition to pay them; and if they are not, there is a breach of this implied guarantee. The fact of their insolvency must be taken to be a matter rather within the knowledge of the party passing the notes than of the person receiving them. Notice of non-payment to the drawer of a bill is required on the presumption that he has funds in the hands of the acceptor; and notice to the indorser is required in order to enable him to take his remedy over against the drawer; but here the defendant was neither drawer nor indorser of the notes. There is no ground for presuming, that a mere passer of bankers' notes has any funds in the hands of the bankers; nor has he, like the indorser of a bill or note, any remedy over against a third party on the instrument. It cannot reasonably be presumed, therefore, that the defendant could have derived benefit from having earlier notice of the dishonour of the notes. If he had in fact sustained any damage by reason of the want of notice, that fact should have been proved, as, for instance, if he had paid any money to the bankers after the stoppage, without setting off the sum due on the notes, and to that extent he would be entitled to be indemnified; but here he has sustained no such damage.

Cresswell, *contra*.—By the statute 3 & 4 Ann. c. 9, s. 7, it is enacted, “that if any person doth accept any bill of exchange, for and in satisfaction of any former debt, the same shall be [* 379] accounted a full and complete payment * of such debt, if such person accepting any such bill for his debt doth not take his due course to obtain payment thereof by endeavouring to get the same accepted and paid.” Here there was a former debt, the notes were taken for that debt, and the plaintiff did not take his due course to obtain payment thereof. It is clear, therefore, that unless bills of exchange stand upon a different footing from promissory notes, the debt for which the notes in question were given has been satisfied. But since the statute 3 & 4 Ann. c. 9, there is no distinction in this respect between a promissory note and a bill of exchange. In *Bayley on Bills*, p. 171. it is laid down, that the receipt of a bill or note implies an undertaking from the receiver to every party to the bill or note, who would be entitled to bring an action on paying it, to present in proper time the one, where necessary, for acceptance, and each for payment: to allow no extra time for payment, and to give notice without delay to such person of a failure in the attempt to procure a proper acceptance or payment. This is the general rule, and there are many cases where it has been held that the insolvency of the drawer and acceptor of a bill of exchange does not dispense with the necessity of notice. *Russell v. Langstaffe*, Doug. 514; *Howe v. Bowes*, 16 East, 112, 5 Taunt. 30 (14 R. R. 319); *Rohde v. Proctor*, 4 B. & C. 517 (28 R. R. 369). In *Esdaile v. Sowerby*, 11 East, 114 (10 R. R. 440), the insolvency of the drawer and acceptor, and the knowledge of that insolvency by the defendant, was held not to dispense with the necessity of a demand of payment, and notice to the defendant of the dishonour of the bill: and it was there said, that notice means something more than knowl- [* 380] edge, because it was competent to the * holder to give credit to the maker. From this it would seem that the holder of a bill, or promissory note, by neglecting to present them, is considered as giving a new credit to the acceptor or maker; and this view of the subject is taken by PRATT, Ch. J., in the case of *Moor v. Warren*, Str. 415. There the defendant, at two o'clock in the afternoon, gave the plaintiff a banker's note, and he tendered it in payment the next morning at nine; the banker stopped a quarter of an hour before. In that case PRATT, Ch. J., told the

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jury that the loss should fall on the defendant, there being no laches in the plaintiff, who had demanded the money as soon as was usual in the course of dealing, and that keeping the note till next morning could not be construed as giving a new credit to the banker; and the jury found for the plaintiff; and in *Holme v. Barry*, Str. 415, the circumstances were the same; and KING, Ch. J., of the Common Pleas gave a similar direction, and the jury found accordingly. But it follows from these cases, that if a new credit had been given, the loss would have fallen upon the holder of the instrument. In *Cory v. Scott*, 3 B. & Ald. 619, the rule is well laid down, that notice of dishonour must be given to all parties, who, upon paying the bill or note, would be entitled to a remedy over against some prior party; and in *Dennis v. Morrice*, 3 Esp. 158, Lord KENYON refused to receive evidence that no actual damage had been sustained from the neglect to give notice. Here the defendant, upon taking up the notes in question, would clearly have had a remedy over by action against Dobson and Co. If then the insolvency of the maker does not render notice of the dishonour unnecessary, and the defendant, according to the general *rule, was entitled to notice, the only remaining [*381] question is, whether it makes any difference that the notes were paid away by him after Dobson and Co. had stopped payment. There is no case precisely in point; but in principle there is no difference between this case and *Beeching v. Gower*, Holt, N. P. 313 (17 R. R. 644), where it appeared that a note of a country bank was given in payment while the bank continued open, but before the time allowed by the law merchant for presentment had expired, the bank failed; yet it was held that the holder was bound to present the note for payment in due time, and by neglecting to do so, made it his own. The cases of *Warrington v. Farbor* and *Swingard v. Bowes* are wholly inapplicable; there the party, relying upon the want of notice, was unconnected with the instrument, and would not by paying it have acquired any remedy over against prior parties.

BAYLEY, J. — I think that the defendant in this case is entitled to the judgment of the Court. One short observation disposes of *Warrington v. Farbor* and *Swingard v. Bowes* the authorities cited to show that it was not necessary in this case to prove presentment for payment. In those cases, the person insisting on the

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want of presentment was not a party to the bill; but here the defendant was a party to the notes, for they were payable to the bearer on demand, and he was the holder of them, and when such notes are passed from hand to hand, the person taking them must trace his right through the former holder. If the notes had been given to the plaintiff at the time when the corn was sold, [* 382] he could have had no remedy upon them against the defendant. The plaintiff might have insisted upon payment in money. But if he consented to receive the notes as money, they would have been taken by him at his peril. If indeed he could show fraud or knowledge of the maker's insolvency in the payer, then it would be wholly immaterial whether they were taken at the time of sale or afterwards. Here the notes were given to him in payment subsequently, and the question is, whether they operate as a discharge of the debt due to the plaintiff in respect of the corn. The rule as to all negotiable instruments is, that if they are taken in payment of a pre-existing debt, they operate as a discharge of that debt, unless the party who holds the instrument does all that the law requires to be done, in order to obtain payment of them. Then the question is, what it was the duty of the plaintiff to do in order to obtain payment of these notes. They were intended for circulation. But I think that he was not bound immediately to circulate them, or to send them into the bank for payment: but he was bound, within a reasonable time after he had received them, either to circulate them or to present them for payment. Now here it is conceded, that if there had not been any insolvency of the bankers, the notes should have been circulated or presented for payment on the Monday. It is clear that the plaintiff on that day might have had knowledge that the bankers had stopped payment, and having that knowledge, if presentment was unnecessary, he had then another duty to perform. In consequence of the negotiable nature of the instruments, it became his duty to give notice to the party who paid him the notes, that the bankers had become insolvent, and that he, the plaintiff, would resort to the defendant for payment of [* 383] the notes: and it would *then have been for the defendant to consider whether he could transfer the loss to any other person, for unless he had been guilty of negligence, he might perhaps have resorted to the person who paid him the notes. That party would, however, be discharged if he received

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no notice of non-payment, or of the insolvency of the bankers till a week after he had paid them to the defendant. The neglect, therefore, on the part of the plaintiff to give to the defendant notice of the insolvency of the bankers, may have been prejudicial to the defendant. The law requires that the party on whom the loss is to be thrown, should have notice of non-payment, in order to enable him to exercise his judgment whether he will take legal measures against other parties to the bill or note. Now here, if the notes had been returned on the Tuesday to the defendant, he might have taken steps against the bankers, and he had a right to exercise his judgment whether he would do so or not, although they had stopped; or he might have had a remedy against the person who had paid him the notes. It may be hard in some cases that the entire loss should fall upon any one individual, but it is a general rule applicable to negotiable instruments, and not to be relaxed in particular instances, that the holder of such an instrument is to present promptly, or to communicate without delay notice of non-payment, or of the insolvency of the acceptor of a bill or the maker of a note, for a party is not only entitled to knowledge of insolvency, but to notice that in consequence of such insolvency he will be called upon to pay the amount of the bill or note. The case of *Berching v. Gower* is an answer to the whole of the argument for the plaintiff, founded upon the fact, that the notes were paid away after the bank had stopped. For these reasons I am of opinion that the plaintiff is *not [* 384] entitled to recover, and that a judgment of nonsuit ought to be entered.

HOLROYD, J. — I think that, under the circumstances of this case, the plaintiff is not entitled to recover. The notes were paid by the defendant and received by the plaintiff as money, and having been paid and received as money, and both parties being innocent, and the notes being what they imported to be, it seems to me that they must, according to the case of *Miller v. Race*, 1 Burr. 452, operate as payment. But without deciding that the plaintiff was debarred in the first instance from electing to consider them either as negotiable instruments, or as money, I think they operated as payment, and that the plaintiff, by not taking due steps to obtain payment, lost his right to return them to the party from whom he received them; for although bills and notes, delivered

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as satisfaction of a debt, do not in general operate as a satisfaction, unless they turn out to be valuable, yet the case is otherwise if due steps are not taken to obtain payment from the party who is in the first instance bound to pay them. The instruments in question are, in point of law, promissory notes, and therefore due diligence ought to have been used to obtain payment, and if payment had been refused, notice ought to have been given of that refusal. Now, here the notes were not presented for payment. It is true, that at the time when the plaintiff ought to have presented them for payment, the bankers had become insolvent; but that being so, the plaintiff ought then, at all events, to have given notice to the defendant that the bankers had become insolvent [* 385] solvent; and that he, the plaintiff, *therefore required him, the defendant, to pay them. Not having done so, I think the plaintiff is not entitled to recover.

LITTLEDALE, J. — I think the plaintiff is not entitled to recover. If the notes were taken as negotiable instruments, then they were taken subject to a condition, that the holder would do all that was required to obtain payment in that case; and they ought to have been presented for payment within a reasonable time, or at least notice of the insolvency of the bankers ought to have been given to the defendant. If they were taken as money, absolutely and without any condition, then the plaintiff took them for whatever they might be worth. It would be otherwise if they were forged, for then they would not be what they purported to be. But here, they were what they purported to be. I think that there is no guarantee implied by law in the party passing a note payable on demand to bearer, that the maker of the note is solvent at the time when it is so passed. *Judgment of nonsuit.*

ENGLISH NOTES.

The above case was referred to by the Court during the argument in *Smith v. Mercer* (1867), L. R. 3 Ex. 51, 52, 37 L. J. Ex. 21, 17 L. T. 317. The plaintiffs, in that case, had sold to the defendants goods to be paid for by cash or “approved bankers’ bills.” The defendants had paid for them by an “approved banker’s bill” which was dishonoured on presentment for acceptance. The defendants were not parties to the bill, and received no notice of dishonour. It was held that the liability of the defendants was not more extensive than it would have been if they had indorsed the bill. They either took it as

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cash out and out (in which case *cautio quæstio*), or they took it upon the terms that they should have recourse to the defendants, as if the defendants had indorsed the bill, in which case they could not have been liable without due notice of dishonour.

A distinction has been taken in the case where a payment has been made in notes which by reason of an infirmity not observed by either party are valueless. The plaintiff, in such a case, has been held not to be prejudiced by some delay in making his demand. *Leeds and County Bank v. Walker* (1883), 11 Q. B. D. 84, 52 L. J. Q. B. 590, — a case fully stated in the Notes to No. 6 of "Banker," 3 R. C. 659.

AMERICAN NOTES.

The rule is supported by many American cases. See *Re Ouimette*, 1 Sawyer (U. S.), 47; *Brown v. Crook*, 21 California, 386; *Jennison v. Parker*, 7 Michigan, 355; *Phoenix Insurance Co. v. Allen*, 11 Michigan, 501; *Whitten v. Wright*, 34 Michigan, 92; *Stam v. Kerr*, 31 Mississippi, 199; *Brower v. Jones*, 3 Johnson (N. Y.), 230; *Jones v. Savage*, 6 Wendell (N. Y.), 658; *Dayton v. Trull*, 23 Wendell (N. Y.), 345; *Smith v. Miller*, 43 New York, 171; 52 id. 545; *Darnall v. Morchouse*, 45 New York, 64; *Gordon v. Price*, 10 Fredell (N. Car.), 385; *Mehlberg v. Fisher*, 24 Wisconsin, 607.

In *Mehlberg v. Fisher*, *supra*, DIXON, Ch. J., said, at p. 609: "The taking of a bill of exchange on a previous indebtedness of the drawer to the payee, is *prima facie* payment of the debt. It is absolute payment, if the payee, or holder, through his own negligence, fails to take proper steps to obtain payment of the bill, or, if not paid, to charge the drawer with liability upon it; as, if the payee or holder fails to present it within the proper time, or, presenting it, fails to give proper notice of its non-acceptance or non-payment in cases where such notice is required."

In cases of this sort, the debtor is generally a party to the instrument, either as drawer or indorser of the bill, or as indorser of the note. In such cases will the same lack of diligence on the part of the creditor which relieves the debtor from liability on the instrument, relieve him also from the original debt? There is some conflict of authority on this point. In 2 Daniel on Negotiable Instruments, 4th ed. sect. 1276, it is said: "When a party contracts a debt, and contemporaneously gives in conditional payment his draft upon a third party, it is the duty of the creditor to present it in a reasonable time for acceptance or payment, and to give notice in the event of its dishonor to the drawer. If he fail to make such presentment, or to give due notice, the drawer is not only discharged from liability on the bill, but also from the debt or consideration for or on account of which it was given. And where a bill or note is indorsed by the creditor in conditional payment of a debt, the same rule would apply, the indorser standing in the relation of a new drawer; and if there were any laches respecting presentment or notice, he would be no longer liable on the note, or for the consideration."

On the other hand there is considerable authority for the proposition that the rule which makes demand and notice essential to a recovery against a

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drawer or indorser as such does not apply in actions brought to recover the original debt for which the bill or note has been taken in payment; and that want of demand and notice will not be a defence unless payment has actually been lost through the laches of the creditor.

Thus, in *Hamilton v. Cunningham*, 2 Brockenbrough (U. S.), 350, 372, MARSHALL, Ch. J., said: "I cannot forbear noticing the distinction taken between the right to recover on the bill which had been dishonored, and on the original debt. It was admitted that no suit could be sustained on the dishonored bill. Why? Because the law merchant applied to it, and the doctrine of notice discharged the drawer and indorser. If this necessarily applied to the debt, on account of which the bill was given, then there could be as little question in a suit for that debt, as on the bill. The law merchant would settle one case as positively as the other; but while the claim on the bill was abandoned as desperate, that for the original debt was defeated, only by the consideration of actual loss sustained, in consequence of the negligence of the creditor who was the holder of the bill."

And in *Kephart v. Butcher*, 17 Iowa, 240, it was held that when the payee of a note receives from the maker an unmatured negotiable note, payable to such maker, and indorsed by him in blank to such payee in conditional payment of the original note, a failure to duly present the second note for payment, and give notice of non-payment to the indorser, will not operate as an absolute satisfaction of the original note, if the party thus receiving the note can affirmatively and clearly show that the indorser sustained no actual damage. And the Court decided that when the indorser retained in his own hands ample security for the payment of the note not protested, he was not prejudiced by such neglect. At p. 249, DILLON, J., said: "We therefore hold the better and true rule and criterion to be *actual loss* or *prejudice*, and consequently the creditor who has taken the note of a third person for a pre-existing debt is not debarred from resorting to the original consideration, although he has not presented the instrument or given notice of its dishonor, provided he can clearly and satisfactorily show that the debtor has not, in consequence of such omission, sustained any injury." See 2 American Leading Cases, 5th ed. p. 291; *Gallagher v. Roberts*, 2 Washington's Circuit Court Rep. (U. S.) 191; *McCrary v. Carrington*, 35 Alabama, 698.

In *Cook v. Beech*, 10 Humphreys (Tenn.), 412, where defendant, being indebted to plaintiff, drew an order on a third person, which was protested for non-acceptance, but no notice of protest given, it was held, that no action could be maintained on the order against the drawer; yet the drawee might maintain his action on the original consideration, and the order would be *prima facie* evidence of such consideration.

But see 2 Daniel on Negotiable Instruments, 4th ed. sect. 1277.

In cases where the debtor is not a party to the bill or note which he gives in payment, it seems clear that the creditor's laches must have resulted in actual damage in order to terminate the debtor's liability on the original cause of action. *Anderson v. Timberlake*, 111 Alabama, 377; *Holmes v. Briggs*, 131 Pennsylvania State, 233; 2 Daniel, sect. 1278.

If a party from whom a check is received in conditional payment of a

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debt sustains a loss by want of diligence in its presentation, it will operate as absolute payment. *Middlesex v. Thomas*, 20 New Jersey Eq. 39; *Syracuse, &c. R. Co. v. Collins*, 1 Abbott's New Cases (N. Y.), 47; *Kilpatrick v. Home Building & Loan Ass'n*, 119 Pennsylvania State, 30; Bennett's note to Benjamin on Sales, 7th ed. p. 772. See also *Taylor v. Wilson*, 11 Metcalf (Mass.), 44; *Bradford v. Fox*, 38 New York, 289.

In *Taylor v. Wilson*, *supra*, the Court said, at p. 51: "We are of opinion that the remittance of the check to the plaintiff was not in itself payment of the demand. A check is merely evidence of a debt due from the drawer. Whether it shall operate as payment or not, depends on two facts: *first*, that the drawer has funds to his credit in the bank upon which it is drawn; and *second*, that the bank is solvent, or, in other words, pays its bills and the checks duly drawn upon it, on demand. The receipt of a check, therefore, before presentment, if there is no laches on the part of the holder, is not payment of the debt for which it is delivered. But if the party receiving it is guilty of laches in presenting it, or in giving notice of non-payment, after presentment, and the bank in the meantime suspends payment, he thereby makes it his own, and it shall operate as payment of his debt; the drawer having funds in the bank at the time of drawing the check, and not having withdrawn them."

The debtor must show that as a result of the laches of the creditor, he has suffered actual damage. Thus, in *Syracuse, &c. R. Co. v. Collins*, *supra*, the Court said, at p. 51: "The Judge, however, found that it was possible and perhaps probable that the checks might have been collected. But this finding was not sufficient to defeat the recovery. The defendant was bound to show that by the laches of the plaintiff in keeping or dealing with the check without a demand of payment or notice to him, he had suffered damage, and then to the extent of such damage the law, to avoid circuity of action, would treat the debt as paid."

As to the duty resting on a creditor who has received from his debtor the check of an insolvent bank, to return the check within a reasonable time, see *Magee v. Carmack*, 13 Illinois, 289; *Fogg v. Sawyer*, 9 New Hampshire, 365; *Westfall v. Bratley*, 10 Ohio State, 188; *Townsend v. Racine Bank*, 7 Wisconsin, 185.

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PAYMENT BY MISTAKE.

No. 1. — *SKYRING v. GREENWOOD*.

(K. B. 1825.)

No. 2. — *COCKS v. MASTERMAN*.

(K. B. 1829.)

No. 3. — *LONDON AND RIVER PLATE BANK v. BANK OF LIVERPOOL*.

(Q. B. 1895.)

RULE.

MONEY paid and received in good faith in circumstances under which the payee may be presumed to have acted on the belief that the money was his own, cannot be recovered back on the ground that the payment was made under a mistake.

Skyring v. Greenwood.

4 Barn. & Cress. 281–291 (28 R. R. 264).

Payment by Mistake. — Recovery barred.

[281] The paymaster of a military corps had given credit in account to an officer in that corps from the 1st January, 1817, to the 5th November, 1820, for certain increased pay, erroneously supposed to be granted by a general order of the 27th August, 1806, to an officer of his situation, and a statement of that account was delivered to the officer in 1821. In December, 1816, the paymasters were informed by the Board of Ordnance that the increased pay granted by the order of 1806 would not be allowed to persons in the situation of the officer in question. The paymasters did not communicate this information to the officer until 1821, and subsequently to that time they continued to receive his pay: *Held*, in an action brought by his personal representative to recover such pay, it was not competent to the paymaster to retain any of such sums of money on account of the sums which they had credited him for by way of increased pay, and which they had allowed him to consider his own for so long a period of time.

Assumpsit for money had and received by the defendants to the use of G. Skyring in his life-time, and to the use of the plaintiff,

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as administratrix since his death. Plea, general issue. At the trial before ABBOTT, Ch. J., at the Middlesex Sittings after last Michaelmas Term, the following appeared to be the facts of the case: The plaintiff was administratrix of the late G. Skyring, who was major in the Royal Artillery. The defendants were paymasters of the Royal Artillery, and held their office by commission, as other officers in the corps hold theirs. The pay of the whole army was fixed by regulations established in 1806. These regulations were made known to the different branches of the army by general orders issued from the respective proper departments, and the general order for the ordnance or artillery issued from the headquarters at Woolwich, in August, 1806, in these words: "His Majesty having been most graciously pleased to express his * approval of the classes of officers, non- [* 282] commissioned officers, and gunners of the royal regiment of artillery partaking of the advantages in point of pay granted to the infantry, as far as the several ranks of one service correspond with those of the other, to commence from the 1st of July, 1806; the following rate of increase to the pay is announced in orders, and attaches to the invalid battalions, marching battalions, horse brigade, foreign and the King's German artillery, viz. (amongst other ranks), captain and second captain, 1s. 1d. *per diem*, two shillings *per diem* more to captains having the brevet rank of major or any superior rank, adjutants and quarter-masters who hold two commissions are not entitled to the increase of pay. First gunners are entitled to the same increase of pay as gunners. The above increase of pay and allowances to officers are granted under the same restrictions as the allowance of one shilling a day, added to the pay of subalterns in 1797, and, consequently, the difference between the former and increased rates is not in any case to be received by an officer holding more than one military commission or appointment, nor to give claim to any higher half pay on reduction." The regulations of 1797 were likewise published by a general order, dated the 28th of July in that year, and were in the following words: "His Majesty is graciously pleased to order, that from the 25th of last month, an allowance of one shilling *per diem* shall be made to each captain, first lieutenant, adjutant, and quarter-master belonging to the marching and invalid battalions of the royal regiment of infantry artillery not holding another commission." G. Skyring was a captain in

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the royal regiment of artillery, having also the brevet rank [* 283] of major before * the 1st of January, 1817, and from thence to the 5th of November, 1820, when he obtained the regimental rank of major, and during the same time had the appointment of brigade-major of the garrison of Gibraltar. There was a running account between Major Skyring and the defendants from the 1st of January, 1817, to the 31st of December, 1820, in which credit was allowed to him for his pay to the 5th of November, 1820, including therein 1s. 1*d.* per day increase of captain's pay granted by the order of the 27th of August, 1806, from the 1st of January to the 31st of December, 1817, amounting to £19 15*s.* 5*d.*, and two shillings a day increase granted by the same order to captains having the brevet rank of major, from the 1st of January, 1817, to the 5th of November, 1820, amounting to £140 10*s.*, which two sums make together £160 5*s.* 5*d.*, and a statement of that account was delivered to Major Skyring early in 1821, and there appeared due to him on the balance thereof £116 9*s.* 7*d.* Major Skyring was allowed credit for these sums of 1s. 1*d.* and 2*s.* a day in the account, in conformity with the usage which prevailed in paying other officers of the regiment having the same rank and appointment during the same period, and which had prevailed from the date of the general order of the 27th of August, 1806, and according to which all such payments have been allowed by the Board of Ordnance in the account of the defendants with them to the 31st of December, 1816.

The Board of Ordnance, in December, 1816, intimated to the defendants that they would not allow any payments of the 1s. 1*d.* and 2*s.* a day to officers having the rank and appointment which Major Skyring had, and that the same were not warranted by the order of 1806: but this intimation was not communicated [* 284] to Major * Skyring otherwise than by the defendants ceasing to allow him credit for the 1s. 1*d.* a day after the end of 1817, and writing to him the following letter, dated the 8th of May, 1821. " Sir, — We beg to acquaint you that a deduction has been made by the Honourable Surveyor-General from your regimental pay, and which has been confirmed by the Board, of £391 14*s.* 5*d.*, being the increase of 1s. 1*d.* and 2*s.* brevet *per diem*, granted by the regulations of 1806, but to which it appears you were not entitled, having held the appointment of brigade-major at Gibraltar from the 1st of July, 1806, to the 5th of November,

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1820, in addition to your commission as an officer of artillery. We have, therefore, to request you will make a remittance for the above sum. Memorandum. Increase pay, 1s. 1d., 1st of July, 1806, to 31st of December, 1816, and brevet pay 2s. per day, 4th of June, 1813, to the 5th of November, 1820."

The sum of £391 14s. 5d. mentioned in that letter, included the £160 5s. 5d. hereinbefore mentioned. The Board of Ordnance refused to allow the defendants any payments of the 1s. 1d. and 2s. a day subsequent to the 31st of December, 1816. The running account between Major Skyring and the defendants was continued to the 6th of December, 1822, the day of his death, during which time his pay and various sums on other accounts received and paid by the defendants by his order, were placed to his account, but no statement of the account was delivered to him by the defendants.

The defendants, after the death of Major Skyring, delivered to the plaintiff a statement of their account with him to the day of his death, in which they brought forward, and amongst other items allowed him credit for *the £116 9s. 7d. bal- [* 285] ance due on the former statement of the account, and charged him with the aforesaid sum of £391 14s. 5d., which included the £160 5s. 5d. as aforesaid. But the charge of £391 14s. 5d. has been since reduced by the defendants to the said £160 5s. 5d., which latter sum the defendants claimed a right to retain, on the ground of their having by mistake allowed to Major Skyring 1s. 1d. a day from the 1st of January to the 31st of December, 1817, and 2s. per day from the 1st of January, 1817, to the 5th of November, 1820, making the amount of £160 5s. 5d., as ordnance pay beyond the amount of which the ordnance regulations entitled him to. Upon these facts the LORD CHIEF JUSTICE was of opinion, that the account rendered by the defendants in 1821 was an admission by them that they had received the allowances in question on account of the plaintiff, and that they were not entitled afterwards to rescind the admission, because they had received a communication in 1816 from the Board of Ordnance that those additional allowances would not be allowed, and they never communicated that intimation to Major Skyring, and under these circumstances a verdict was found for the plaintiff. A rule *nisi* having been obtained for a new trial,

Scarlett and Bingham now showed cause. — The defendants are

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not entitled to set off the sums which they have allowed Major Skyring in account, although, according to the true construction of the order, they may not have been due to him of right. If the defendants had actually paid those sums to Major Skyring with a full knowledge of all the facts of the case, but under a mistaken view of his right, they could not afterwards have [* 286] *recovered them back: *Bilbie v. Lumley*, 2 East, 469 (6 R. R. 479), *Lowry v. Bourdieu*, Doug. 467; and the reason of this rule of law is given by GIBBS, Ch. J., in *Brisbane v. Dacres*, 5 Taunt. 143 (14 R. R. 718). That was an action against the widow of Admiral Dacres, to recover a sum paid to him by Captain Brisbane, as his share of certain freight for the carriage of bullion, which share he was entitled to according to an old usage prevailing in the navy, though not according to a practice introduced recently before the payment, but overlooked by the parties. GIBBS, J., HEATH, J., and MANSFIELD, Ch. J., agreed against CHAMBRE, J., that the action could not be maintained. GIBBS, J., there says: "I think that where a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover back the sum he has so voluntarily paid. It may be, that upon a further view he may form a different opinion of the law, and, it may be, his subsequent opinion may be the correct one. If we were to hold otherwise, many inconveniences may arise; there are many doubtful questions of law: when they arise, the defendant has an option, either to litigate the question, or to submit to the demand, and pay the money. I think that by submitting to the demand, he that pays the money gives it to the person to whom he pays it, and makes it his, and closes the transaction between them. He who receives it has a right to consider it as his without dispute: he spends it in confidence that it is his; and it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment, should [* 287] be at liberty, at any time within the Statute of * Limitations, to rip up the matter and recover back the money. He who receives it is not in the same condition; he has spent it in the confidence it was his, and perhaps has no means of repayment." It is true, that in this case the money has not been actually paid into the hands of Major Skyring, but he was allowed credit for it in the account delivered to him in 1821, and he was

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thereby led to suppose that he was entitled to treat it as his own. The reasoning of GIBBS, J., applies equally to a case where the money has been allowed in account, as to one where it has been actually paid; for a party to whom an account is delivered by his agent, calculates his expenses with reference to that account. The allowance of these sums in account is equivalent to payment. In *Jeff's v. Wood*, 2 P. Wms. 128, it was held that the set-off of one sum of money against another upon the balance of account amounted to payment. Here too the defendants were informed in 1816 that the Board of Ordnance would not allow these sums to persons in the situation of Major Skyring, and they never communicated that fact to him until 1821. If they had informed him at that time that the sums were not to be allowed, he would not have treated them as his own property.

They then proceeded to argue, that the defendants, by reason of their character of paymasters, were estopped by the account they had rendered, from saying that the money which they had allowed in account was by mistake. The paymaster receives the money due to the corps from government, and when he has once represented to an officer by an account rendered, that he has * received money on his account, he is estopped from afterwards saying that he has not received such money. [* 288]

But it is unnecessary to report the arguments on this point, as the judgment of the Court proceeded entirely on the first ground.

Gurney and Tindal, *contrà*. — It must be admitted, that if the defendants had paid these sums to Major Skyring with a full knowledge of all the facts, they would not be entitled to set them off, but here there never was any payment. That distinguishes this from the several cases cited. Here the defendants have merely rendered an account, in which they have, by mistake, allowed the deceased credit for sums to which he was not entitled, and they ought in justice to be permitted to correct the error when they discover it.

ABBOTT, Ch. J. — It is not necessary to decide in this case, whether the defendants by reason of their character of paymasters are estopped, by the account which they have rendered, from saying that there was a mistake in it. The opinion which I entertained at the trial was founded on a particular fact in this case, and that opinion remains unaltered. The defendants, as paymas-

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ters, received sums from government generally on account of the corps, and an order having been issued for an increase of pay, they rendered an account to Major Skyring in 1821, in which they gave him credit for the increased pay to which they supposed him to be then entitled, and upon that account there appeared to be due to Major Skyring a balance of £116 9s. 7*d.* If he had drawn

a bill upon them for that amount, it probably would have [* 289] been paid, and if they had paid the money, *it is quite

clear that they could not afterwards have recovered it back, on the ground that according to the true construction of the order it was not due to Major Skyring; and if the defendants could not have recovered it back, they ought not now to be allowed to set it off. The defendants afterwards continued to receive further sums on account of Major Skyring, and the money so subsequently received by them must be considered as paid off, if they are entitled to bring back into the account the sums which they had given him credit for, in respect of the increased pay. The particular fact in this case upon which my judgment proceeds is, that the defendants were informed in 1816 that the Board of Ordnance would not allow these payments to persons in the situation of Major Skyring, but they never communicated to him that fact until 1821, having in the mean time given him credit for these allowances. I think it was their duty to communicate to the deceased the information which they had received from the Board of Ordnance; but they forbore to do so, and they suffered him to suppose during all the intervening time that he was entitled to the increased allowances. It is of great importance to any man, and certainly not less to military men than others, that they should not be led to suppose that their annual income is greater than it really is. Every prudent man accommodates his mode of living to what he supposes to be his income; it therefore works a great prejudice to any man, if after having had credit given him in account for certain sums, and having been allowed to draw on his agent on the faith that those sums belonged to him, he may be called upon to pay them back. Here the

[* 290] defendants have not merely made an error in *account,

but they have been guilty of a breach of duty, by not communicating to Major Skyring the instruction they received from the Board of Ordnance in 1816; and I think, therefore, that justice requires that they shall not be permitted either to recover

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back or retain by way of set-off the money which they had once allowed him in account.

BAYLEY, J. — This may be a case of hardship upon the defendants, but they have brought it upon themselves. This is an action for money had and received. If the defendants are entitled to set off the sum they claim, the action is not maintainable. From the year 1816 to 1821 the defendants had given credit for certain sums, as if Major Skyring was entitled to them. I think they were guilty of a neglect of duty in not communicating to him the information they had received from the Board of Ordnance in 1816. Suppose that the balance of the account delivered in 1821 had been paid to Major Skyring, and that no subsequent pay had been received for his use by the defendants, and that they had brought an action to recover back the money paid. It would have been a good defence to that action to say that the defendants had voluntarily advanced money to the deceased when he asked no credit, and that they had told him that they had received the money for his use, and that on the faith of their representation he had drawn it out of their hands as his own money, and had been induced to spend it as such; and if they could not recover the money back, neither ought they now to be allowed to retain other moneys belonging to the deceased, upon the ground that they have paid or allowed him in account money which they had not in fact received to his * use, but which they suffered [* 291] him to consider his own for a long period of time. I think they cannot now be permitted to say, that the money which they allowed him in account as money received by them to his use, was not money received to his use. The rule for a new trial must therefore be discharged.

HOLROYD, J. — The present action is brought for money had and received by the defendants to the plaintiff's use, subsequently to the communication made by the Board of Ordnance to the defendants, and of which the deceased was not informed till 1821. The plaintiff has a right to recover, unless the defendants have a debt to set off. Now Major Skyring had a right to expect that money belonging to him would be received by defendants for him, and that all payments made by them were on account of moneys so received by them. Suppose that Greenwood and Co. had paid

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Major Skyring the balance of the account in 1821, and that no money belonging to him had come subsequently to their hands, they could not have recovered that money back, on the ground that they had paid it to him under a mistaken notion that he was entitled to it. A payment, therefore, made under such circumstances, would not create a debt between the defendants and Major Skyring. Here, it is true, the defendants did not pay the balance. But they now say, that some of the money which they paid to Major Skyring was not paid to him, on account of moneys received for him by them, but was paid by them under the mistaken notion that he was entitled to it, and, therefore, that such payment constituted a debt from Major Skyring to them, which they are now entitled to set off; but I think, for the reasons already given, it did not constitute a debt, and that being so, the plaintiff is entitled to recover.

Rule discharged.

Cocks and others v. Masterman and others.

9 Barn. & Cress. 902-909 (33 R. R. 365).

Forged Acceptance. — Payment by Bankers. — Right of Bonâ-fide Holder to resist Claim for Repayment.

[902] A bill, purporting to have been accepted by A., was presented for payment to his bankers on the day when it became due. The latter, believing it to be the genuine acceptance of A., paid the amount, but on the following day, having discovered that the acceptance was a forgery, they gave notice of that fact to the party to whom they had paid the bill, and required him to return the money: *Held*, that the holder of the bill is entitled to know, on the day when it becomes due, whether it is honoured or dishonoured, and that, no notice of the forgery having been given on the day the bill became due, the parties who had paid the money were not entitled to recover it back.

Assumpsit for money paid, had, and received, &c. Plea, non-assumpsit. At the trial before Lord TENTERDEN, Ch. J., at the London Sittings after Michaelmas Term, 1827, a special verdict was found, stating in substance as follows:—Long before, and at the several times hereinafter mentioned, the plaintiffs carried on business as bankers at Charing Cross, in the city of Westminster, and the defendants carried on business as bankers in Nicholas Lane, in the city of London. Before and on and after the 24th of May, 1827, certain persons carrying on trade and business under the firm and style of Sewell and Cross, kept an account and

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cash with the plaintiffs as their bankers; and certain other persons carrying on trade and business under the firm and style of Sanderson and Co., kept an account and cash with the defendants, as their bankers; and before the said 24th of May a bill of exchange, drawn by one T. Dutton, upon Sewell and Cross, bearing date the 21st of March, 1827, for £198 19s., payable two months after date to the order of T. Dutton, and indorsed by the said T. Dutton, and also by C. Heginbotham and one J. Harris, and purporting to be accepted by Sewell and Cross, payable at the plaintiffs', was paid to the defendants by Sanderson and Co. to their credit with the defendants; and upon the said 24th of May the defendants presented the said bill to the plaintiffs, and required them to pay the same according to the said acceptance, and

* that the plaintiffs, believing the acceptance to be that of [* 903] Sewell and Cross, paid to the defendants the sum of £198

19s. as the amount of the bill of exchange so purporting to be accepted as aforesaid; that on the 25th day of May (being the day next following the day on which such payment was made) the plaintiffs discovered that the acceptance on the bill was not the acceptance of Sewell and Cross, but that the same was forged by T. Dutton, the drawer of such bill; that the said acceptance was in fact so forged; and that on the said 25th of May, about one o'clock, the plaintiffs gave notice to the defendants and to J. Harris, the indorser, and to Sanderson and Co., that the same was so forged; and that the said payment had been made by them under a mistake, and in ignorance of the acceptance being so forged, and they requested the defendants to repay them the said sum of £198 19s.; and on the same day one Thomas Gates, as attorney for the Bankers' Society for Protection against Forgers, and of which society the plaintiffs and defendants were members, sent the following letter to C. Heginbotham, the other indorser, and also a like one to J. Harris:— "Sir, a bill of exchange, bearing your indorsement for £198 19s., drawn by Thomas Dutton, and purporting to be accepted by Sewell and Cross, and indorsed by you to J. Harris, due yesterday, has been refused payment, and now lies with me, the acceptance being forged; and if the same is not taken up by ten o'clock to-morrow, legal proceedings will be taken against all parties." The sum of £198 19s. was entered by the plaintiffs in the day-book, to the debit of Sewell and Cross, but was not carried into the ledger or further

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[* 904] charged to their account; Sanderson and Co. did not * draw out of the hands of the defendants any sum of money upon the credit of or in respect of the said bill, and the balance of moneys belonging to Sanderson and Co., in the hands of the defendants as their bankers, both before and at and after the several days before mentioned, greatly exceeded the said sum of £198 19s. The case was now argued by

R. V. Richards, for the plaintiff. — The money in this case was paid by the plaintiffs to the defendants without consideration, and under a mistake as to the facts; it may therefore be recovered back in this action. On the other side, the cases of *Price v. Neal*, 1 W. Bl. 390, 3 Burr. 1354, and *Smith v. Mercer*, 6 Taunt. 76 (46 R. R. 576), will be relied on. The first was an action by the drawee of two bills to recover back the amount which he paid to the holder; one of the bills he had previously accepted, the other he had not, but both were paid by him when at maturity. Now the drawee, by accepting, precludes himself from disputing the handwriting of the drawer, and the effect of payment by the drawee must be the same; the Court, therefore, in that case, properly decided that the plaintiff could not recover. Here the question is very different, being between agents of the holder and drawee, and not between the parties themselves. In *Smith and Others v. Mercer*, the plaintiffs (who were the bankers of Evans, whose acceptance had been forged) paid the bill when due, to the defendant's agent, and did not discover the forgery for seven days, when notice was given. CHAMBRE, J., held that the money might

be recovered back; the rest of the Court were of a different [* 905] opinion; but * the judgment of GIBBS, Ch. J., proceeded entirely on the ground that the prior parties to the bill were discharged by the length of time that elapsed between the payment of the bill and the giving of the notice; and the opinion of DALLAS, J., appears to have been much influenced by the same circumstance. Here no such consequence followed from the payment, the forgery was discovered, and notice to all prior parties given on the day next after the payment. The judgment of HEATH, J., was on the ground that if the drawee had paid the bill, he would have been bound by the payment, and therefore the plaintiff, his agent, was bound; but the plaintiffs in this case were not agents for the payment of the bill in question; they were agents for the payment of genuine bills only, and this was

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paid by mistake. *Smith v. Mercer*, therefore, is not an authority for the defendants. On the other hand, *Jones v. Ryde*, 5 Taunt. 488 (15 R. R. 561), and *Bruce v. Bruce*, 5 Taunt. 495, 1 Marsh. 165 (15 R. R. 566 n.), are in point for the present plaintiffs. In the former, the plaintiff had discounted for the defendant a forged vi-tualling bill, the Bank of England had taken it from the plaintiff and received payment at the Victualling Office. The forgery was afterwards discovered. The bank first, and then the plaintiff, returned the money received on the bill, and the latter was held entitled to recover over against the person for whom he discounted it. Now, if the present plaintiffs are not entitled to recover, it is impossible to support that decision. [BAYLEY, J. — That was an action by the buyer against the seller of a forged bill.] That is true, but there the drawee had paid the bill, and if the case had been governed by *Price v. Neal*, he could not have sued * the prior holder, nor could the latter have sued the [* 906] then defendant. *Wilkinson v. Johnson*, 3 B. & C. 428 (27 R. R. 393), also very closely resembles this case. There a bill dishonoured by the acceptor was presented to the agent of a supposed indorser, who paid it for the honour of that person. The indorsement proved to be a forgery, and the agent was allowed to recover back the money so paid. The Court held, that the plaintiff was deceived by the presentment of the bill to him as the agent of the supposed indorser; so here the plaintiffs were deceived by the presentment of the bill to them as the bankers of the supposed acceptor. Nothing was done in this case that could prejudice any of the parties; when the forgery was discovered, the holder of the bill had not drawn out any of the money from the hands of the defendants, and none of the prior parties to the bill were discharged by laches. Unless then it be held that if the forgery had been discovered immediately after the payment, the money could not have been recovered back; the present plaintiffs must be entitled to recover in this action.

Pollock, *contra*. — The defendants are entitled to retain the money which they received for their customer. The case presents two conflicting principles: first, that money paid under a mistake may be recovered back: secondly, that the acceptance or payment of a bill cannot be revoked: and the question is, by which of these principles the present case is to be governed. The first has been applied with this limitation, that where the party paying has

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knowledge of all the facts or the means of knowledge, he [* 907] cannot recover back the money paid. * Here the plaintiffs had the means of knowing their customer's handwriting, it was their duty to know it, and, therefore, they cannot recover back the money on the ground that they paid it under a mistaken supposition that the bill was accepted by their customer. If, indeed, the mistake had been discovered immediately, the transaction might have been undone, for then no new circumstances vaying the situation of the parties could have intervened. Here a whole day intervened, new circumstances might have arisen, and the Court will not inquire whether they did or not. *Smith v. Mercer*, 6 Taunt. 76 (16 R. R. 576), is directly in point for the defendants, and *Wilkinson v. Johnson*, 3 B. & C. 428 (27 R. R. 393), cited for the plaintiff, differs, for there the mistake was discovered on the same morning when the payment was made. [BAYLEY, J. — There too the bill was taken to the plaintiffs', and presented to them as a bill bearing the genuine indorsement of Heywood and Co.]

Richards, in reply. — The whole of the argument for the defendants rests on the ground that the banker is bound to know his customer's handwriting; but that ground existed equally in *Wilkinson v. Johnson*, and was held insufficient to defeat the plaintiff's claim. Unless the mistake as to the fact can be attributed to the laches of the party paying, he is entitled to have his money returned. *Milnes v. Duncan*, 6 B. & C. 671 (30 R. R. 498).

Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the Court: —

This was an action brought by Cocks and Co., bankers in [* 908] London, to recover a sum of money paid by them to * the defendants, on the ground that they, having paid the money in mistake and ignorance of the facts, were entitled to recover it back. The bill was presented the 24th of May, the day on which it became due. The plaintiffs paid it, not knowing that it was not the genuine acceptance of Sewell and Cross. On the following day it was discovered that the acceptance was a forgery, and the plaintiffs on that day gave notice to the defendants. It was insisted that the plaintiffs were not entitled to recover, because they, being bankers, ought, before they paid the bill, to have satisfied themselves that the acceptance was genuine. On

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the other hand it was said that the plaintiffs, having given notice of the forgery to the defendants on the day next after the bill had been paid, were entitled to recover back the money, on the ground that they had paid the money under a mistaken supposition that the acceptance was the genuine acceptance of Sewell and Cross, and the case of *Wilkinson v. Johnson*, 3 B. & C. 428 (27 R. R. 393), was relied on. That case differs from the present in one material point, viz., that the notice of the forgery was given on the very day when payment was made, and so as to enable the defendant to send notice of the dishonour to the prior parties on that day. In this case we give no opinion upon the point, whether the plaintiffs would have been entitled to recover if notice of the forgery had been given to the defendants on the very day on which the bill was paid, so as to enable the defendants on that day to have sent notice to other parties on the bill. But we are all of opinion that the holder of a bill is entitled to know, on the day when it becomes due, * whether it is an honoured [* 909] or dishonoured bill, and that, if he receive the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. The holder, indeed, is not bound by law (if the bill be dishonoured by the acceptor) to take any steps against the other parties to the bill till the day after it is dishonoured. But he is entitled so to do, if he thinks fit, and the parties who pay the bill ought not by their negligence to deprive the holder of any right or privilege. If we were to hold that the plaintiffs were entitled to recover, it would be in effect saying that the plaintiffs might deprive the holder of a bill of his right to take steps against the parties to the bill on the day when it becomes due.

Judgment for the defendants.

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1896, 1 Q. B. 7-12 (s. c. 65 L. J. Q. B. 80; 73 L. T. 473).

Bill of Exchange. — Forged Indorsement. — Payment to Bonâ-fide Holder. — [7] Right to recover Money.

When a bill becomes due and is presented for payment, and is paid in good faith and the money is received in good faith, if such an interval of time has elapsed that the position of the holder may have been altered, the money so paid cannot be recovered from the holder, although indorsements on the bill subsequently prove to be forgeries.

No. 3. — London and River Plate Bank v. Bank of Liverpool, 1896, 1 Q. B. 7, 8.

Action tried without a jury before MATHEW, J., in the Commercial Court.

On April 18, 1893, Hippolyto Garcia, a merchant in Monte Video, purchased, at the plaintiffs' branch establishment in Monte Video, a draft at 120 days' date, drawn on the plaintiffs in London, for £261 0s. 11*d.*, and made payable to the order of Fueyo & Co. The bill was drawn as usual in three parts, and on April 19, Hippolyto Garcia sent the first of exchange to his correspondents, Fueyo & Co., in Havannah, in payment of an account. On April 22, he wrote again to them, sending the second of exchange. Neither of these letters ever reached Fueyo & Co. On June 20, a person calling himself Pedro Garcia was introduced to Messrs. Loychate & Co. of Havannah. He produced the first and second of exchange of the draft purchased by Hippolyto Garcia at Monte Video on April 18, and he asked Loychate & Co. to discount the bill. The bill then bore indorsements of which the following are translations: "Pay to the order of Don Hippolyto Garcia. Monte Video, April 18, 1893. Fueyo & Co." "Pay to the order of Don Pedro Garcia. Monte Video, April 20, 1893. Hippolyto Garcia." Both those indorsements subsequently proved to be forgeries.

At the request of Loychate & Co. the so-called Pedro Garcia indorsed the bill, "Pay to the order of Messrs. Larrinaga & Co., value in account with Messrs. Loychate & Co. June 20, 1893.

Pedro Garcia."

[* 8] * Loychate & Co. informed Pedro Garcia that they could not discount the bill until they knew whether it would be accepted; and on June 21, they wrote to Larrinaga & Co., enclosing the first and second of exchange, and asking them to telegraph when the bill was accepted. The bill was received by Larrinaga & Co. in Liverpool on July 6, and was presented by them for acceptance at the head office of the plaintiffs on July 7, and was accepted. On July 10, Larrinaga & Co. telegraphed to Loychate & Co. that the bill had been accepted; and the next day Loychate & Co. paid to Pedro Garcia the discounted amount of the bill.

Pedro Garcia then disappeared, and could not now be found.

On July 12, Larrinaga & Co. wrote to Loychate & Co., acknowledging the receipt of the bill, "with which we credit your account subject to payment."

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On July 31, Larrinaga & Co. paid the bill into their account at the Bank of Liverpool, and that bank passed the proceeds to the credit of Larrinaga & Co., who drew against the bill.

On August 19, the bill was presented for payment to the plaintiffs by Messrs. Glyn, Mills, Currie, & Co., as agents for the Bank of Liverpool. It was paid by the plaintiffs; and the money was transmitted by Messrs. Glyn, Mills, Currie, & Co. to the Bank of Liverpool.

On September 22, Messrs. Fueyo & Co. wrote to Hippolyto Garcia, asking for payment of their account; and on October 27, he replied, telling them what he had done on April 18 and 22, and sending the third of exchange. This reached the hands of Fueyo & Co.; and after some correspondence it was presented to the plaintiffs in London, and was accepted and paid by them on July 19, 1894. They then commenced this action against Glyn, Mills, Currie, & Co., the Bank of Liverpool, and Larrinaga & Co., for the return of £261 0s. 11*d.*, as money received by the defendants for the use of the plaintiffs.

The action was discontinued as against Glyn, Mills, Currie, & Co., and now came on to be tried as against the other two defendants.

Bigham, Q. C., and Boydell Houghton, for the plaintiffs.

— The * plaintiffs can recover this money back. The defend- [* 9] ants, no doubt, acted *bonâ fide* in presenting the bill, but they had no title to it. There was no negligence on the part of the plaintiffs in accepting and paying it. The money was paid under a mistake; and the rule in such cases is that where there is no negligence or constructive negligence on the part of the person paying, the money so paid can be recovered. This is the principle underlying all the decisions. *Price v. Neal*, 3 Burr. 1355; *Smith v. Mercer*, 6 Taunt. 76 (16 R. R. 576); *Wilkinson v. Johnson*, 3 B. & C. 428 (27 R. R. 393); *Milnes v. Duncan*, 6 B. & C. 671 (30 R. R. 498); *Cocks v. Masterman*, 9 B. & C. 902 (p. 68, ante). [They also referred to the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), sects. 24, 54, and 59.]

T. G. Carver, for both defendants. — The money cannot be recovered back. The principle is laid down in *Cocks v. Masterman*, that money paid under a mistake to a *bonâ-fide* holder of a bill cannot be recovered where the position of the payee is altered before the discovery of the mistake. In this case the defendants

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are too late to give notice of dishonour of the bill, and have lost recourse against prior indorsees. The plaintiffs cannot have judgment against both defendants, but must elect against which they will proceed.

Bigham, Q. C., replied.

Cur. adv. vult.

Nov. 6. **MATHEW, J.** — This is an action brought by the plaintiffs to recover from the Bank of Liverpool and from a firm of Larrinaga & Co. the sum of £261 0s. 11*d.*, the amount of a draft, which had been accepted by the plaintiff bank and which they paid, but which they allege they paid under a mistake of fact. It appeared, a long time after payment had been made, that the indorsements on the draft were forgeries. It followed that the plaintiffs were not liable upon the draft at the time that they paid it. It is admitted that the Bank of Liverpool and Larrinaga & Co. had become possessed of the bill in good faith, and, so far as they were concerned, they were as ignorant as the plain-
[* 10] tiffs of the fact that the indorsements *were forged. [The learned Judge then stated the facts set out above, and proceeded:—]

The learned counsel for the plaintiffs argued that if it could be shown that the plaintiffs had not been negligent when they paid the money over, it might be recovered from the Bank of Liverpool or from Larrinaga & Co. It was agreed that there was no evidence of negligence on the part of the plaintiffs; that when they paid the bill they paid it under the impression that it was a genuine bill, and that there were no means whatever of ascertaining that the indorsements on the bill were forgeries. It was said that the substance of the rule, that where there was no negligence in a case of this sort, the acceptor paying a forged bill could get the money back, was recognised in the early case of *Price v. Neal*, 3 Burr. 1355. In that case the acceptor of the bill (I am referring to one only of the two bills mentioned in the judgment), in the belief that the signature of the drawer was genuine, paid the amount. The bill turned out to be a forgery. In an action to recover the money paid to the holder, Lord MANSFIELD is reported to have said that the acceptor was bound to know the drawer's handwriting. From that it was argued that the foundation of the liability of the plaintiffs in such a case was negligence, and that if there was no negligence the acceptor was entitled to recover the

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money back. But that is not the decision. If the forgery was cleverly executed, reasonable care would not enable the acceptor to know that it was a forgery; and it would seem extraordinary that the right of the acceptor to recover the money paid to the holder should depend upon whether or not the forgery was cleverly executed. That is what it comes to. It was not said in that case that there had been negligence. Nor was it said that if there had been no negligence the action would lie. Neither of those propositions is laid down, and one or the other of them would have been indispensable to the position taken up by the learned counsel for the plaintiffs in this case. It seems to me the principle underlying the decision is this: that if the plaintiff in that case so conducted himself as to lead the holder of the bill to believe that he considered the signature genuine, he could not *afterwards withdraw from that position; and no single [*11] case has been produced in which, where payment has been made on a forged indorsement to the holder of it in good faith, the money has been recovered back. This case was followed by another case, *Smith v. Mercer*, 6 Taunt. 76 (16 R. R. 576), where it was said in the course of some of the judgments that, where a banker had paid a forged draft believing that it had been accepted by his customer, he ought to know his customer's signature. The same observations that I have made apply to that case. He may not be able by any amount of care to ascertain whether or not the acceptance was a forgery. That case, therefore, does not establish the principle for which Mr. Bigham contended. The true principle is developed in the clearest possible form in the case of *Cocks v. Masterman*, 9 B. & C. 902 (p. 68, *ante*). There was an intermediate case of *Wilkinson v. Johnson*, 3 B. & C. 428 (27 R. R. 393), which stands by itself, and which we need not discuss. In *Cocks v. Masterman*, the simple rule was laid down in clear language for the first time that when a bill becomes due and is presented for payment the holder ought to know at once whether the bill is going to be paid or not. If the mistake is discovered at once, it may be the money can be recovered back; but if it be not, and the money is paid in good faith, and is received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back. That rule is obviously, as it seems to me, indispensable for the conduct of business. A holder

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of a bill cannot possibly fail to have his position affected if there be any interval of time during which he holds the money as his own, or spends it as his own, and if he is subsequently sought to be made responsible to hand it back. It may be that no legal right may be compromised by reason of the payment. For instance, the acceptor may pay the bill and discover on the same day that the bill is a forgery, and so inform the holder of it, so that the holder would have time to give notice of dishonour to the other parties to the bill; but even in such a case it is manifest [*12] that the position of a man of business may be * most seriously compromised, even by the delay of a day. Now that clear rule is one that ought not to be tampered with. It is one of the few rules of business which is perfectly clear and distinct at present, and, as it seems to me, it is unimpeachable. The rule has been recognised in the case of *Mather v. Maidstone*, 18 C. B. 273. In the particular case before me there cannot be a question that the position of the Bank of Liverpool would be seriously compromised if they were now compelled to repay this money, because it was not until months after that it was discovered that there was anything wrong with the bill, and meanwhile the Bank of Liverpool had lost their right of giving notice to Larrinaga & Co. that the bill had not been paid.

That leads me to refer to what was discussed by Mr. Carver, namely, the exact position of the Bank of Liverpool in the matter. The Bank of Liverpool and Larrinaga & Co. are both made defendants, and the plaintiffs' counsel was called upon to elect as to which he would proceed against. If Larrinaga & Co. had handed the bill for collection to the Bank of Liverpool, Larrinaga & Co. would be the proper defendants on the assumption of liability; if, on the other hand, the Bank of Liverpool were the holders of the bill by indorsement from Larrinaga & Co., the Bank of Liverpool would be the persons to sue, on the same assumption of liability.

In this case I am satisfied that the Bank of Liverpool were holders of the bill, that payment was made to them, and that they are entitled to retain the money. Therefore I think this action fails; and I give judgment for the defendants with costs.

Judgment for defendants.

Nos. 1-3. — *Skyring v. Greenwood*; *Cocks v. Masterman, &c.* — Notes.

ENGLISH NOTES.

In *Daniell v. Sinclair* (1881), 6 App. Cas. 181, 50 L. J. P. C. 50, 44 L. T. 257, 29 W. R. 569, where accounts had been made out and settled between a mortgagor and mortgagee on the footing, erroneously supposed to be authorised by the deed, of compound interest; the Court allowed the account to be re-opened. The judgment appears to suggest a doubt whether the principle on which *Skyring v. Greenwood* was decided would hold good in equity. But it would probably have been enough to have said that the principle would not apply to prevent the Court exercising equity against a mortgagee.

In *Reg. v. Blenkinsop*, 1892, 1 Q. B. 43, 61 L. J. M. C. 45, 66 L. T. 487, 40 W. R. 272, the Court refused to apply the principle of *Skyring v. Greenwood* to a case where a rating authority had, under a mistake of law, assessed a rate upon one third only, instead of upon the full value, of certain property of the railway company, and had subsequently claimed the unpaid rate upon the remaining two thirds, as arrears. The Court held that the railway company were bound to pay the claim.

AMERICAN NOTES.

Skyring v. Greenwood is cited in Keener on Quasi-Contracts, p. 73, as authority for the proposition that one who has paid money under a mistake cannot recover it if he has been guilty of laches in asserting his claim, and a recovery by him will throw a loss upon the defendant.

In general, unless the mistake was caused by the defendant, it seems that a recovery should not be allowed where the defendant cannot be put *in statu quo*. "It seems difficult to establish in a case where the defendant cannot be said to be more responsible for the mistake made by the plaintiff than is the plaintiff himself, that he should in conscience return to the plaintiff money paid under mistake, where the result of such repayment is to throw a loss upon the defendant which he would not have suffered, had not the payment been made. The principle that forbids the defendant enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself against loss at the expense of an innocent and blameless defendant." Keener on Quasi-Contracts, 67: citing *Ellis v. Ohio Life Ins. & T. Co.*, 4 Ohio State, 628 (*semble*). See also *Guild v. Baldrige*, 2 Swan (Tenn.), 295, 304. But see *Kingston Bank v. Eltinge*, 40 New York, 391, and *Corn Exchange Bank v. Nassau Bank*, 91 id. 74, establishing for New York the doctrine that an irrevocable change of position involving a loss to the defendant, where the parties are equally innocent, constitutes no defence to an action brought to recover money paid under mistake.

If the mistake was caused by the defendant's negligence, and the plaintiff did not contribute to it, change of position on the part of the defendant is no defence to an action to recover back the money. *Union Bank v. United States Bank*, 3 Massachusetts, 74.

Pedlar; Penalty.

But where the mistake was due to the plaintiff's negligence, although this will not, in the absence of other facts, preclude his recovery according to the weight of authority (see cases cited in Keener, 70-71), it seems clear that he should not be allowed to recover, if a recovery would throw a loss on the defendant. *Walker v. Conant*, 65 Michigan, 194; *Rickey v. Clark*, 11 Utah, 467. In the former of these cases, the Court said, at pp. 197-198: "The rule is general that money paid under a mistake of material facts may be recovered back, although there was negligence on the part of the person making the payment: but this rule is subject to the qualification that the payment cannot be recalled when the situation of the party receiving the money has been changed in consequence of the payment, and it would be inequitable to allow a recovery. The person making the payment must in that case bear the loss occasioned by his own negligence."

The burden of proof is on the defendant to show a change of position. *Walker v. Conant*, *supra*; *Mayer v. New York*, 63 New York, 455.

The general principle is that in order to entitle a plaintiff to recover money paid under a mistake, he must prove, not only that he was acting under a mistake, but that it is against conscience for the defendant to retain the money so paid. See Keener on Quasi-Contracts, 43-59, and the following cases therein discussed: *Goddard v. Town of Seymour*, 30 Connecticut, 394; *Hubbard v. Hickman*, 4 Bush (Ky.), 204; *Sheridan v. Carpenter*, 61 Maine, 83; *Mayor v. Erben*, 10 Bosworth (N. Y.), 189; *Franklin Bank v. Raymond*, 3 Wendell (N. Y.), 69; *Buel v. Boughton*, 2 Denio (N. Y.), 91; *Jackson v. McKnight*, 17 Hun (N. Y.), 2; *Kingston Bank v. Ellinge*, 66 New York, 625; *Boas v. Updegrave*, 5 Pennsylvania State, 516.

As to the recovery of payments made under a mistake as regarding the genuineness of negotiable instruments, there is a valuable note in Keener, 154-158. See also a note in 17 American State Rep. 889.

PEDLAR.

(See "HAWKER and PEDLAR," 12 R. C. 501.)

PENALTY.

(See No. 39 of "CONTRACT," 6 R. C. 406; Nos. 47, 48, 49, of "CONTRACT," and Notes, 6 R. C. 540 *et seq.*)

No. 1. — *Lechmere v. Lady Lechmere*, Cas. temp. Talbot, 80. — Rule.

PERFORMANCE.

No. 1. — *LECHMERE v. LADY LECHMERE*.

(1735.)

No. 2. — *SOWDEN v. SOWDEN*.

(1785.)

RULE.

WHERE a deceased person had covenanted to do an act, and has done that which may *pro tanto* be considered as a performance of his covenant, he will be presumed to have done the act with that intention, and his estate will be treated as if he had been a trustee to complete the performance.

Lechmere v. Lady Lechmere.

Cas. temp. Talbot, 80-93 (s. c. nom. *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211).

Covenant. — Part Performance by Deceased Covenantor. — Trust binding on Estate.

Money upon a marriage is agreed to be laid out in land in fee, and [80] settled on husband and wife, remainder to their sons in tail male, remainder to the husband, his heirs and assigns forever: A covenant, that until the money be laid out in land, the interest to be paid to the persons who were to have the rents of the lands when purchased. The husband purchased several estates, but never settled any, and died intestate *sans* issue, leaving a considerable real estate to descend to his heir-at-law. The heir may compel the administratrix, the widow, to invest this money in the purchase of lands: and the lands descended upon him will not go in satisfaction of the covenant, except as to such as were purchased after the covenant.

The late Lord Lechmere, upon his marriage with the Lady Elizabeth Howard, daughter to the Earl of Carlisle, and in consideration of £6000 portion, covenanted with the Earl of Carlisle and the Lord Morpeth, his son, to lay out, within one year after the marriage, the said sum of £6000 and likewise the farther sum

No. 1. — Lechmere v. Lady Lechmere, Cas. temp. Talbot. 80-82.

of £24,000, amounting in the whole to £30,000, in the purchase¹ of freehold lands in possession, which were to be settled upon the Lord Lechmere himself for life, without impeachment of waste, remainder to trustees and their heirs during the life of the Lord Lechmere, to preserve contingent remainders, remainder for so much as would amount to £800 *per annum* to the Lady Lechmere, for her jointure, remainder of the whole to the first and other sons of the marriage in tail male, remainder to the trustees for five hundred years, for the raising a portion or portions for the daughter or daughters of the marriage, remainder to the Lord Lechmere, his heirs and assigns forever; but if there should be no daughters, that the said term was to cease for the benefit of the Lord Lechmere, his heirs and assigns forever. And the said Lord Lechmere farther covenanted, that until the said £30,000 should be laid out in lands as aforesaid, there should be paid interest for the same after the rate of £5 per cent unto the persons entitled to the rents and profits of the lands when purchased.

The Lord Lechmere, after his marriage, purchased several estates in fee simple in possession, but which were never settled according to the covenant; as also several terms and reversions, &c., and in the year 1727 died intestate and without issue, leaving a considerable real estate, to the value of about £1800 *per annum* to descend upon the plaintiff, his nephew and heir-at-law. The Lady Lechmere took out administration; and the plaintiff brought his bill against her for an account of the Lord Lechmere's personal estate, and to have this covenant carried into execution; his remainder by the death of Lord Lechmere without issue now taking effect: as also to have some purchases completed which were left incomplete by the Lord Lechmere's death.

The Lady Lechmere insisted by her answer, That the plaintiff, being no way privy to any of the considerations within this [82] covenant, could not compel her to lay out the £30,000 in the purchase of lands for his benefit: but that if he could, the lands which Lord Lechmere had permitted to descend on him, being to the value of £1800 *per annum*, ought to be taken in full satisfaction for all the benefit the plaintiff could be entitled to as

¹ It appears from the report in Peere Williams (3 P. Wms. 211, 220) that the purchase was to be with the consent of the Earl of Carlisle and Lord Morpeth, which Sir J. Jekyll, M. R., considered to

make no difference; and this is pointed out by Sir LLOYD KENYON, M. R., in his judgment in *Sawden v. Sawden* (p. 95 *infra*). R. C.

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heir-at-law to the Lord Lechmere, who designed these several purchases to be settled according to the uses specified in the covenant.

The cause was first heard at the Rolls, and there decreed for the heir-at-law, Mr. Lechmere, upon both points; viz., that he was entitled to have a specific performance of this covenant; and secondly, That the several estates which descended upon him were not a satisfaction for this covenant, or any part of it; and now coming on to be heard before the LORD CHANCELLOR,

Mr. Pauncefort, Mr. Strange, Mr. Browne, and others, argued for the plaintiff, That he could not in this case be considered as a mere volunteer, but was in some sort a purchaser, according to *Jenkins and Kemish's Case*, Hardr. 395, Lev. 150, 237. But that though he should be taken for a volunteer, yet he must prevail against an administratrix; and this to serve the intent of the Lord Lechmere, who by his covenant has said, that his heirs-at-law should have an interest in the land, and in the money until the land be purchased. That the heir was in contemplation at the time of the Lord Lechmere's entering into this covenant, appears from the provision, that in case there should be no daughters, the term of five hundred years should cease for the benefit of him and his heirs. That wherever a man enters into a lawful engagement, and is prevented by death, or any other accident, from carrying his agreement into execution, the Court will look upon it as performed. That the strength of this rule appeared from the case of *Sweetapple v. Bindon*, 2 Vern. 536, where the husband was decreed to stand in the same condition as if the money had been actually laid out in land; although no rule of law be clearer, than that the husband shall never be tenant by the curtesy, but where he has reduced his wife's estate into possession during [83] her life. That though every tenant in fee has his heir in his power, yet, if the ancestor does nothing to divest the natural right which his heir hath to succeed him, and to have a specific execution of his covenant, he shall always prevail against the executor or administrator, even when the covenant was merely voluntary; as appears by the case of *Holt v. Holt*, 2 Vern. 322, the trustees neglecting to compel the Lord Lechmere in his lifetime to perform his covenant, cannot prejudice either party who is entitled to have it carried into execution; for, if so, the doctrine of this Court would be entirely overturned, and trustees would become Judges

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whether and how far men should be bound by their covenants: but by the known rules of this Court trustees are bound to execute the trust in the manner the persons that made the conveyance have directed; and have no latitude of judgment left to them, to distinguish whether the conveyance be made upon a valuable consideration or not? or, whether the persons claiming under the trust be volunteers or purchasers? If then the neglect of the trustees will not affect the case one way or the other, the whole must depend upon the equity of the heir and administratrix. And taking the heir even but as a volunteer, yet he is such a volunteer as is greatly favoured both at law and in this Court; and will always appear in a more favourable light than an executor or administrator: as appears from the several cases of *Kettleby v. Atwood*, 1 Vern. 298, 471; *Knight v. Atkins*, 2 Vern. 20; *Baden v. Com. Pembroke*, 2 Vern. 52; *Lancey v. Fairchild*, 2 Vern. 101; *Lingen v. Sowray*, Eq. Ca. Abr. 175 (s. c. 1 P. Wms. 172; Prec. in Ch. 400); and *Vernon v. Vernon*, in the House of Lords (1732), 2 P. Wms. 594; and *Kentish v. Newman* (July 1713), 1 P. Wms. 234, where a *feme* being possessed of £200, the husband before marriage covenanted to join so much to her £200 as would purchase £30 *per annum* to be settled on them two, and the heirs of their bodies, remainder to the husband in fee; and until the settlement made, the £200 to be taken as part of her separate [84] estate; and if no settlement made during the husband's life, and she survived, then to remain to her; but if he survived, then to go to her brothers and sisters: the marriage took effect in 1688, and they had issue a daughter; the wife died in 1711, before the husband, no purchase having been made: upon a bill brought by the daughter, she had a decree against the brother and sister of her mother, though the money had not been laid out within the time provided by the articles, the Court looking upon the purchase as completed. This case not only fully proves the right of the heir, but likewise that he shall not lose that right through any accidents preventing the execution of agreements within the time prefixed. Here are no creditors, no want of assets, and consequently no equity to prevail against the heir. They farther insisted, That if this covenant was to be carried into execution, it could not be done partially; but, being equally binding as to all parties, all are equally entitled to the benefit of the execution; that therefore it could not be confined singly to the

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purchase of lands of £800 *per annum*, for the Lady Lechmere's jointure; but the whole must be carried through, and limited to the heir in the manner it would have been limited to the Lord Lechmere himself, had he been alive. The Lady Lechmere cannot vary the execution of the articles; and the covenant being to lay out the whole sum of £30,000, which is an entire covenant, cannot be restrained to a covenant for purchase of lands of £800 *per annum*, only for the Lady Lechmere's jointure. This method would be admitting the representative to contradict what the Lord Lechmere himself has said should be land, and land for the benefit of his heir; which appears from the provision, that until the lands purchased, interest at £5 per cent should be paid to such persons as should be entitled to the rents of these estates. Many of the cases cited were not so strong as the present one, being founded upon voluntary agreements, which nevertheless have been carried into execution for the benefit of the heir against the executor; and insisted upon that of *Vernon v. Vernon*, as a case in point, and no way distinguishable from the present; the matter resting upon the covenant in that case as well as in [85] this, and the execution of that covenant decreed in favour of the heir against the wife, both in this Court and in the House of Lords; notwithstanding all the same objections made there in her behalf that can be made here for the defendant.

To the second point they argued, That the Lord Lechmere having not done anything in his lifetime to show his intent that these late purchases should go in satisfaction of his covenant, in part or in the whole, no supposed intent could prevail against the heir for the administratrix, she not having so good an equity as he; especially seeing that suppositions may be as well one way as the other. That the cases of satisfaction depend upon the particular circumstances of each case, appears from the cases of *Duffield v. Smith*, and *Goodfellow v. Buckett*, 2 Vern. 258, 298, and also from the intent of the parties, as is most manifest from that of *Saville v. Saville*, where the only difference was between a descent of lands in fee, which by the settlement were to be a satisfaction; and that which happened, of a descent of lands in tail of equal value, of which the daughters might, by levying a fine, have made themselves tenants in fee; and yet held there not to be a satisfaction, because the intent was, that the fee simple lands should descend. In the present case it does not appear that the intent

was, that those fee simple lands should go in satisfaction; for, if he had so intended, he would have acquainted the trustees with his design of performing so much of his contract by these purchases; and as no intent appears, it is no more than if the Lord Lechmere had given a bond to his heir, and had then permitted these lands to descend upon him; in which case it cannot be pretended, that the descent would have been a satisfaction for the bond, or that the administratrix could have defended herself against this demand by such an argument. So if he had owed £1000 to his next of kin, the distributive share would never have

been taken as a satisfaction for the debt. A less thing can-
[86] not go in satisfaction for a greater, as in *Atkinson's and*

Webb's Case, 2 Vern. 478. But an equivalent must be given, which must appear to have been intended as a satisfaction. And in that of *Eastwood v. Fink* (April, 1732), 2 P. Wms. 616, it was held that a devise, which was to go in satisfaction, must be of the same nature as the thing for which it was to be an equivalent; and therefore held there that money could not go in satisfaction for land, nor copyhold for freehold, &c. How then, according to these rules, can several of these purchases be called a satisfaction? There are terms, reversions, &c., which are not only less in value, but from their nature cannot be limited according to the uses intended by the covenant, which was to purchase freehold lands, and lands in possession; and it is therefore very strange to think that the Lord Lechmere should make purchases, and intend them to go in satisfaction of his covenant, which, he very well knew, could not from their nature or their value answer any description of those he had agreed to purchase; such a construction, besides its absurdity, would go in direct contradiction to the well-known maxim, that an heir is not to be disinherited by a constructive, but a necessary implication only.

Mr. Attorney-General, Mr. Solicitor-General, Mr. Verney, and Mr. Fazakerly argued for the defendant, that the consideration, upon which this covenant was made, extended no farther than to the Lady Lechmere and the children of the marriage, but not at all to the heir, who therefore could be looked upon but as a mere volunteer, and as such had no claim to any equity. That the naming the heirs in the covenant was only to show what should become of the land when the other limitations should be spent; and the provision, that the interest should be paid to such as

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should be entitled to the rents and profits of the estate, was no more than what must have been if it had not been inserted; and so fall within the rules of *expressio eorum*, &c. That it was necessary to explain for what purpose the five hundred years' term was raised; and to provide that in case of failure of [87] daughters, it should sink in the inheritance, in order to prevent its becoming legal assets, which it must otherwise have done. That there was a great difference between a limitation to the heirs of the body, and a general remainder to one and his heirs, the heir being, in the former case, under the immediate contemplation of the parties, but not so in the latter. And that this Court considers even a covenant but as *nudum pactum* in the case of volunteers; for, though it be a Court of conscience, yet that is only to aid such as are in conscience entitled to a performance of the covenant; which cannot be said of a volunteer, unless he, by some particular circumstances, takes himself out of the general rule. Then as to the nature of the obligation, here are no trustees appointed, but the whole rests singly upon the Lord Lechmere's covenant, which is but a personal lien, and must fail whenever he himself becomes entitled to the benefit of what was to be performed by that obligation. The rule that what is covenanted to be done is looked upon as done, holds only in cases where somewhat is vested either in trustees, or some other manner, whereupon the covenant may be a lien; but not where it is a mere personal obligation, as in this case, the whole remaining in the person's own hands. This difference appears from the case of *Lingen v. Sowray*, Eq. Cas. Abr. 175 (s. c. 1 P. Wms. 172, Prec. in Ch. 400), where there was, as appears by the decretal order, an assignment of securities to trustees to be laid out in land, and to be settled; the trustees did not actually receive the securities; but sometime after the marriage the husband called in part of the money himself, and settled it upon the same persons as it was to have been settled upon by the marriage settlement; he afterwards made his will, and devised his personal estate to his wife, against whom a bill was brought by the nephew as heir-at-law; and it appearing that £700 remained upon the same securities at his death as at the time of settlement, it was decreed, that the £700 should be looked upon as land, but that the other part that was actually taken out by him should not be bound. And the Court would not in that case admit the representative of the covenantor

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[88] to say that his ancestor had broken his covenant. The like distinction in the case of *Chaplin v. Horner* (18 March, 1718, at the Rolls), 1 P. Wms. 482, and in that of *Chichester v. Bickerstaff*, 2 Vern. 295. It is held, that though money shall in many cases be considered as land, when bound by articles in order to a purchase made, yet whilst it remains still money, it shall be deemed part of the personal estate of such person who might have aliened the land in case a purchase had been made. And in the cases of *The Countess of Warwick v. Edwards*; *Knight v. Atkins*; *Lancey v. Fairchild*, and *Sweetapple v. Bindon*, 2 Vern. 20, 101, 536, the sums were appropriated, and standing out in trustees' hands, and so not like this case. And in that of *Knight v. Atkins*, the plaintiff was both heir and executor, as appears in 2 Ch. Rep. 400. Indeed the case of *Vernon v. Vernon*, in the House of Lords, 1732, rested upon a bare covenant; but there was an express provision that the brother should have the benefit of the covenant, there being an express estate limited to him, upon which he might have had remedy against Mr. Vernon himself in his lifetime: but it cannot be pretended that the plaintiff could in this case have had any remedy against the Lord Lechmere in his lifetime; Lord Lechmere could have limited the remainder to any other of his relations, in bar of his heir-at-law. In the case of *Cann and Cann*, 1 Vern. 480, the Court refused compelling the executrix to lay out the money in a purchase of lands whereof the husband would, by the articles, have been tenant in tail. The objection, that the covenant was entire, and consequently could not be partially executed, was endeavoured to be answered, by saying, that the Lady Lechmere did not come here to have the covenant carried into execution, but was ready to waive all the pretensions she had under this covenant, unless the Court should think the heir entitled to have it carried into execution, and concluded this point by saying, The heir was as much a stranger to this covenant as the natural daughter was held to be to the covenant for farther assurance in *Foresaker's and Robinson's Case*, Eq. Cas. Abr. 123, and that the Lord Lechmere having lived several years after his entering into this covenant, and having never carried it into execution, [89] this long surceasing was to be taken as a change in his intention, and consequently the heir not entitled to a performance.

As to the second point they argued, that if the heir was entitled to have a specific performance of this covenant, the descent of

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lands to the value of above £30,000, which he took from the Lord Lechmere, must be looked upon as a satisfaction. That wherever a thing is to be done either upon a condition, or within a time certain, yet if a recompense can be made which agrees in substance, though perhaps not in every formal circumstance, such a recompense shall be good, and shall go in satisfaction of the thing covenanted to be done. In the case of *Wilcox v. Wilcox*, 2 Vern. 558, the descent of lands of the same value was held a satisfaction, though in that case the son was a purchaser, which the heir is not in the present case; and in that of *Blandy v. Widmore*, 2 Vern. 709 (s. c. 1 P. Wms. 324), the husband having covenanted to leave his wife £620 at his death, and dying intestate, whereupon her distributive share came to £1000, this was held to be a satisfaction; and in case of portions, they are held to be satisfied either by a devise, or, where given by will, are likewise held to be satisfied by a gift in the party's lifetime, though the will does not take effect till his death.

LORD CHANCELLOR. — The first question is, Whether the plaintiff, the heir-at-law to the Lord Lechmere, be entitled to a specific performance of this covenant? It has been considered by the plaintiff's counsel as an agreement of the Lord Lechmere, and an intent in him to lay out this whole sum of £30,000 in lands at all events; on the other hand, the defendant's counsel have insisted, that the design went no farther than the providing for the Lady Lechmere, and the issue of the marriage. The intent seems to me to be, that the £30,000 should, at all events, be laid out in land, the produce whereof was to be secured to the [90] issue of the marriage, who in this case must have taken as purchasers, but as to the remainder in fee, I do not think that the looking upon the Lord Lechmere either as a purchaser of it or not, will vary the case; since, had the covenant been silent, the remainder must have returned to the person from whom the estate moved: and I think it quite the same whether he is considered as a purchaser, or as a volunteer, the dispute not being between the heir and a third person, but between the two representatives of the Lord Lechmere, the one of his real, the other of his personal estate; the heir's being but a volunteer in regard to his ancestor, will not exclude him from the aid of this Court. But, though the question is between two volunteers, the Court will determine

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which way the right is, and decree accordingly. We must, therefore, see whether the £30,000 is, upon this covenant, to be looked upon as real or personal estate?

It seems to be allowed on both sides, that had the money been deposited in trustees' hands, it must have been looked upon as a real estate, and the heir entitled to the benefit of it. This, I say, seems to be granted, and no authority against it, but what has been collected from the case of *Chichester v. Bickerstaff*, 2 Vern. 295. It is probable that in that case the Court went upon some reason which induced it to think that Sir JOHN CHICHESTER looked upon that money as personal estate; for, otherwise the authority of that case is not to be maintained, being contrary to all the former resolutions, and to a late one in the House of Lords, by which I am bound, viz., that of the *Countess of Warwick v. Edwards*, 2 P. Wms. 271, where the money was decreed to go as land, though to a collateral heir, who was not within the considerations of the settlement; so that it is now a settled point, that where the securities are appropriated, the money shall go as land, not only to the issue of the marriage, but likewise to a collateral heir or general remainder-man, unless there appears some variation in the parties' intent. And indeed it is very reasonable that it should be so: for, otherwise, the neglect of trustees, or any other accident, might overthrow all men's agreements and contracts entered into upon the best and most valuable considerations. But it has been objected, that this case differs from all those: for, that the money was never deposited, but remained in the Lord Lechmere's own hands; and that he only was the debtor. So now the question is, Whether this will make any difference? An heir can no more be looked upon as a creditor against his ancestor, than he can be looked upon as a purchaser under him; he takes with the several burdens that his ancestor lays upon him. And as, on the one hand, the Lord Lechmere bound himself, by his covenant, to lay out this sum of £30,000 in land: he, on the other, acquired a right to an estate for life, and to a remainder in fee, which by his death are now severed, and the remainder only descends upon the heir. If a man articles for a purchase, and binds himself, his heirs, executors, and administrators, he may as well be called, in that case, both covenantor and covenantee, as in the present one; but yet the heir is entitled to have the purchase completed, and may compel the exec-

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utor to do it; because their rights are different, as appears from the case of *Holt v. Holt*, 2 Vern. 322. And wherever a man's design appears to turn his personal estate into land, this gives his heir an advantage which this Court will never take from him. None of the cases cited warrant this present distinction that is endeavoured at; and in reason, I am sure, there is nothing to warrant it; the intent and agreement of the parties being the same in both cases, which if effectual in one case, I cannot see why it should not be so in the other. The only case from which anything like this distinction can be collected, is that of *Lingen v. Sowray*; but I am no ways satisfied that that case was resolved upon that reason; for, in that case, the husband had altered the trust, and the limitations of it. Besides, in that case nobody had any interest in it but he and his wife; and the Court, as appears by the decree, laid great stress upon the change of his intent, appearing by changing the trust; but here no change appearing, the intent remains as it was at the time of the covenant [92] entered into, and consequently a very wide difference between the two cases. In the case of *Chaplin v. Horner*, the husband alone was to have the benefit of the articles, and therefore not at all like the present case. I therefore think that this case falls within the common known rule, that money articted to be laid out in land is to be looked upon as land. The Lord Lechmere was bound at the time of his death to lay out this money in land, by which he gained a right to an estate for life, with a remainder in fee; and the estate for life being determined by the death, the right which he had to the remainder descends upon his heir, and as it comes by his death, nothing that has been done by the Lady Lechmere, either as to the waiver of her jointure, or anything else, can alter or defeat that right. Indeed, to suppose it, would be absurd.

The cases upon satisfaction are generally between debtor and creditor; and the heir is no creditor, but only stands in his ancestor's place. One rule of satisfaction is, that it depends upon the intent of the party; and that which way soever the intent is, that way it must be taken. But this is to be understood with some restrictions; as, that the thing intended for a satisfaction be of the same kind, or a greater thing in satisfaction of a lesser. for, if otherwise, this Court will compel a man to be just before he is generous, and so will decree both. But these questions are

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no way material in this case, which turns entirely upon my Lord Lechmere's intent at the time of these purchases made. Those made before the covenant can never have been designed to go in performance of the subsequent covenant, his intent being clear, that the whole sum of £30,000 should be laid out from the time of the covenant. Then there are terms, with covenants to purchase the fee; but terms are not descendible to the heir, and so no satisfaction. The like of reversions, especially seeing the lives did not fall in during the Lord Lechmere's own life. But as to

the purchases of lands in fee simple in possession, it is to be [93] considered, that there was no obligation upon the Lord Lechmere to lay out the whole sum at one time. Now here are lands in possession, lands of inheritance, purchased, which though not purchased with the privity of trustees, yet it was natural for the Lord Lechmere to suppose that the trustees would not dissent from those purchases, being entirely reasonable; the design of inserting trustees being not to prevent proper, but improper purchases, and though they were not purchased within the year, yet nobody suffered by it, and so this circumstance cannot vary the intent of the party in a Court of equity. The intent was, that as soon as the whole was laid out, it should be settled together, and not to make half a score of settlements. In the case of *Wilcox v. Wilcox*, 2 Vern. 558, the covenant was not perfected; nothing done towards it strictly, but some steps taken by the ancestor which seemed to be intended that way; and it is as reasonable to suppose these purchases to have been intended to satisfy this covenant in the present case, as it was to suppose it so in that. And so varied the decree as to this point only, viz., as to the fee simple lands in possession purchased since the covenant.

His Lordship declared that the late Lord Lechmere's covenant in his marriage articles to invest the sum of £30,000 in the purchase of freehold messuages, &c., of an estate of inheritance in fee simple in possession, to be settled to the uses therein mentioned, ought to be performed, and did order the same accordingly. And it appearing that the said Lord Lechmere, after the said articles, and after his marriage, purchased some messuages and lands for £490, and other lands for £7100, making in the whole the sum of £7894, his Lordship declared that the same ought to be applied towards performance of the said covenant, and that the sum of

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£22106 being the residue of the said £30,000 over and above the said sum of £7894, invested in the said purchases, ought to be raised out of the personal estate of the said Lord Lechmere, and invested in the purchase of freehold messuages, &c., to be settled to such of the uses contained in the said marriage articles, as are still subsisting. And it was further ordered, that the lands before mentioned to have been purchased by the late Lord Lechmere, and such other lands as shall be purchased with the said £22106 be conveyed to the uses following, viz.: As to such and so much of the lands, &c., as shall amount to and be of the clear yearly value of £800, to the use of the said Lady Lechmere for her life, for her jointure, and in lieu of her dower; and after her decease, to the use of the plaintiff, Edmund Lechmere, and his heirs. And that the residue of the said estates be conveyed to the use of the said plaintiff, Edmund Lechmere and his heirs. And it was further ordered that the Master do compute interest at £4 per cent *per annum*, for the said sum of £22106 from the death of the said Lord Lechmere; and that the said sum of £800 *per annum*, to be paid thereout, to, or retained by the said Lady Lechmere, in satisfaction of the arrears of her jointure of £800 a year, that the surplus interest over and above the said £800 a year, be paid to the said plaintiff, Edmund Lechmere; and that the growing interest of the said £22106 be applied in like manner, until the same is invested in the purchase of lands as before directed. And the Lady Lechmere was directed to account for the personal estate of Lord Lechmere; and all parties to be paid their costs out of the personal estate of Lord Lechmere, to be taxed by the Master. Reg. Lib. Ann. 1734, fol. 487.

Sowden v. Sowden.

1 Brown's Ch. Cases, 582, 583, 1 Cox, 165, 166.

Covenant. — Performance cy près by Deceased. — Trust binding on Estate.

A., by marriage settlement, covenanted to pay money to trustees, to [582] be laid out in the purchase of lands: A. did not pay the money, but purchased a freehold estate; decreed it to be subject to the trust.

Robert Sowden, being about to marry Mary Row, by settlement previous to the marriage, bearing date September, 1779, in consideration of £1050, her marriage portion, covenanted to pay to

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the trustees £1500, to be laid out in the purchase of some freehold estate of inheritance in the county of Devon, upon trust, out of the rents and profits thereof, to pay to Mary Row an annuity of £15 *per annum*, for her life, in case she survived her said intended husband; and, after the decease of both, to raise by sale £1500, or £2000, as the case might be, for the portion or portions of the child or children of the marriage, in such shares, &c., as the survivor should appoint. He also covenanted to pay to the [583] trustees the further sum of £500 at the least, to similar uses: and that, in case the lands purchased should not sell for £2000, the deficiency should be made up out of his personal estate. Robert Sowden did not pay the £1500 or £500, to the trustees, but soon after his marriage purchased a freehold estate called Pound, for the price of £2150, and the estate was conveyed to him and his heirs; and he died without making any settlement of that estate, leaving Mary his widow, Thomas his son and heir-at-law, and Mary his daughter, who were the only children of the marriage. He died seised and possessed of other real and personal estate; the real estate descended on the eldest son, and the widow took out administration of the personal estate.

The daughter filed her bill against the son and widow, praying that the trusts of the settlement might be decreed to be performed, and that the estate called Pound might be declared to be subject to the trusts of the settlement, or that the £2000, covenanted to be paid by her father, might be raised out of his personal estate, if sufficient, or the deficiency made good out of his real estate, and the £2000, when raised, might be applied according to the trusts of the settlement.

The cause was heard on the day of December, 1784, and 3rd of February, 1785, when the following cases were cited: *Took v. Hastings*, 2 Vern. 97; *Roundell v. Breams*, 2 Vern. 482; *Wilcox v. Wilcox*, 2 Vern. 558; *Bridges v. Barr*, 2 Eq. Ab. 34; *Wilks v. Wilks*, 5 Vin. Ab. 293; *Lechmere v. Lechmere*, For. 80, 3 P. Wms. 211; *Coffin v. Dyke*, or *Dyke v. Leeds*, 7th July, 1740; *Deacon v. Smith*, 3 Atk. 323; *Attorney-General v. Whorwood*, 1 Ves. 534. There were also mentioned, 5 Bro. P. C. 552; *Edwards v. Freeman*, 2 P. Wms. 435, 665; *Lewis v. Hill*, 1 Ves. 274.

Some parol evidence was offered to show the intention of Robert Sowden in purchasing the estate was to perform his covenant, and it was read, but it was very slight.

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Sir LLOYD KENYON, M. R. — I feel myself in the [1 Cox, 165] same situation in which Lord HARDWICKE expressed himself to be, not inclined to carry these cases further than they have been carried; but at the same time I must not make nice and finical distinctions where the cases are in substance the same with those in which the points have been decided. As to all hardship in this case, I lay all consideration of it totally aside. I must decide this by the cases before decided, and not depart from the established rules of property. Now in this case, beyond all doubt, it was incumbent *on the husband to lay out the money on [* 166] real estate; but the distinction which has been taken is, that the husband covenanted to pay the money to trustees to be laid out, and therefore his laying out money himself in the purchase of the estate, could not be meant as complying with that covenant, and I think the distinction taken by Mr. Hardinge a very important one (and would deserve great consideration if it were *res integra*) between this case where the money is to be paid to trustees, and the others where the party covenants to make the purchase himself. But the main case on which I choose to rely is that of *Lechmere v. Lechmere*. In Forrester's report of that case a very material circumstance is omitted, which is mentioned in P. Wms., namely, that the covenant was to purchase, with the consent of the Earl of Carlisle and Lord Morpeth, and that the purchases made by Lord Lechmere were without that consent. However, this case having decided, that if a man covenant to purchase land *modo et formâ*, and if he do purchase at all, whether *modo et formâ*, or otherwise, it shall be the same thing, this gets rid of great part of the argument; and then I cannot distinguish the present case from *Lechmere v. Lechmere*. The principle is, that "Where a man covenants to do an act, and he does an act which may be converted to a completion of this covenant, it shall be supposed that he meant to complete it." Here the land was in the particular county specified. The case of *Lechmere v. Lechmere* seems to be exactly in point; and upon that case (the principles of which I coincide in) I shall declare this estate to be subject to the trusts of the settlement. Reg. Lib. B. 1784, p. 171.

ENGLISH NOTES.

The case of the *Countess of Warwick v. Edwards* (*Edwards v. Countess of Warwick*), referred to in the judgment of the former of

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the above cases, has been already cited in the notes on the topic of "Conversion," 7 R. C. 20. In that case money was artieled to be laid out on land, and settled on the husband and wife, and the issue of the marriage, remainder to the heirs of the husband. There was issue; but the issue died without issue before the money was laid out; and it was decreed that the money was to be looked upon as land, and should go to the heir; and this decree was affirmed in the House of Lords.

In the case of *Wilcocks v. Wilcocks*, 2 Vern. 558, cited in the same judgment, a man upon his marriage covenanted to purchase lands of £200 *per annum*, and to settle them on himself for life, remainder to his daughters in tail. He purchased lands of £200 *per annum*, after which he made no settlement, but permitted them to descend. This was decreed to be a satisfaction of the covenant.

So in *Barham v. Earl of Clarendon* (1852), 10 Hare, 126, where a settlor in his marriage settlement covenanted to pay a certain debt which had been charged upon the settled estate, and to release the estate therefrom, and the estate reverted under the ultimate limitation to the settlor, who died intestate, it was held, in a question between his heir and personal representatives, that the latter were bound to exonerate the real estate.

The principle of the rule has been applied where a tenant for life of a settled estate sold part of the estate under the authority of an Act of Parliament which directed the purchase money to be laid out in the purchase of land to be settled to the same uses. He afterwards purchased lands to nearly the same value, but died without having settled them: so that they descended to his heir-at-law, who was also the first tenant in tail in remainder under the settlement. Lord BROUGHAM held that the purchase was to be presumed to have been made in performance of the obligation imposed by the Act. *Tabbs v. Broadwood* (1831), 2 Russ. & My. 487. A similar principle is applied in *Tucker v. Lorreridge* (1858), 1 Giffard, 377 (affirmed 2 De G. & J. 650), where, in anticipation of an obligation under a covenant, the testator had raised £10,000 and placed it in the hands of trustees. It was held that the £10,000 was bound by the trust: so that, in the events which had happened, it formed part of the testator's personal estate.

But a general covenant to purchase lands to be settled, does not of itself create, in the hands of the covenantor himself, any specific charge or lien upon lands which the covenantor may own or may have purchased. The circumstance that he subsequently disposes of the land rebuts any presumption of the intention to create a trust, which is the basis of the rule. *Deacon v. Smith* (per L. C. HARDWICKE, 1746), 3 Atk. 323, 327; *Countess of Mornington v. Keane* (Full Court, 1858), 2 De Gex & J. 292, 27 L. J. Ch. 791. But where it has appeared

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that the purchase has been made with the intention of performing the covenant, the estate has, in competition with the trustee in bankruptcy, been held subject to the trust. *Ex parte Poole, Re Symes* (1847), 11 Jur. 1005. In this case it was stated in the petition, and presumably shown by evidence, that the purchase was made with the intention of answering the covenant, although in fact the bankrupt had subsequently mortgaged the subject. Of course the mortgagee, assuming him to be a purchaser for value without notice, was not affected by the trust.

The case of *Blandy v. Widmore* (1716), 1 P. Wms. 323, cited in the argument in *Lechmere v. Lechmere*, depended on an analogous principle. By marriage articles, it was agreed that if B., the wife, should survive A., her intended husband, — A. should leave B. £620; and A. accordingly covenanted with B.'s trustees, that his executors, within three months after his decease, should pay B. £620, if she should survive him. A. died intestate and without issue; upon which B., the wife, by the Statute of Distributions, became entitled to a moiety of the personal estate, which was much more than £620. It was held that the covenant and agreement in the articles were satisfied, without further payment. The same principle is exemplified by the cases of *Lee v. D'Aranda* (1746), 1 Ves. Sen. 1; *Garthshore v. Charlie* (1804), 10 Ves. 1, 7 R. R. 311; *Thacker v. Key* (1869), L. R. 8 Eq. 408.

It has been held, however, that a gift by will is not, *per se*, to be treated as a performance of a covenant by the testator to leave his widow a certain sum. *Haynes v. Micoe* (1781), 1 Bro. C. C. 129; *Derece v. Pontet* (1785), 1 Cox, 188, 1 R. R. 15, Prec. Ch. 240 n., Finch's ed. And it has been held that a covenant by a man to make a provision which is substantially an annuity for his widow is not satisfied by her distributive share received under intestacy. *Couch v. Stratton* (1799), 4 Ves. 391, 4 R. R. 230.

It seems appropriate in this connection to cite the note to *Blandy v. Widmore*, in Mr. Cox's edition of Peere Williams' reports (vol. I. p. 324). He says: "The present case and that of *Lee v. D'Aranda*, 3 Atk. 419, and 1 Ves. 1 (s. c.), have been considered rather as cases of actual performance than of satisfaction of covenants (*vide Barret v. Beckford*, 1 Ves. 520; *Prime v. Stebbing*, 2 Ves. 411). In the cases on the subject of satisfaction, in which the contracting party is supposed to have done some other thing in lieu of the thing contracted for, and which therefore depend more particularly on the implied intention of the party, several rules of presumption have been adopted which do not seem to apply to the cases of performance (*vide Eastwood v. Vinke*, 2 P. Wms. 616). In cases of satisfaction the pre-

sumption will not hold where the thing substituted is less beneficial (either in amount, or certainty, or time of enjoyment, or otherwise) than the thing contracted; for, since *satisfaction* implies the doing of something *equivalent*, and the presumption is so much weakened where the thing substituted is not equivalent to the thing contracted for, that a *part satisfaction* will not be intended; whereas in cases where the thing done can be considered as a *part performance* of the thing contracted for, it shall be so taken. As in covenants to settle lands of a certain value, the subsequent purchase by the covenantor of lands of a *smaller* value (which are at his death left undisposed of) shall be intended to be a *part performance* of such covenant, as it may be presumed he meant to purchase more lands afterwards and settle the whole according to the covenant (*Lechmere v. Earl of Carlisle*, 3 P. Wms. 211). In the case of *Lee v. D'Aranda* (as well as in the present case of *Blandy v. Widmore*) the distributive share amounted to more than the money provided by the covenant, for the present estate (according to Atkyns's report) was £2300, of which the widow was entitled to one moiety, the next of kin being brother and sister of the intestate (as appears by Reg. Lib. B. 1746, fol. 359), and not his children, as mentioned in the report. These, therefore, were not in fact cases of a *part performance* only, but the language of Lord HARDWICKE, in Atkyns's report of *Lee v. D'Aranda*, seems to apply to a *part performance* as strongly as to a *full performance* of the contract. But on this head see more in *Hynes v. Micoe*, 1 Bro. C. C. 129; *Kirkman v. Kirkman*, 2 Bro. C. C. 95; *Richman v. Morgan*, 2 Bro. C. C. 394."

AMERICAN NOTES.

The doctrine of the principal cases is considered in Pomeroy's Equity Jurisprudence, 2nd ed. sects. 578-583; Bispham's Principles of Equity, 6th ed. sects. 535-537; Tiedeman on Equity Jurisprudence, sect. 161.

The language of Bispham is perhaps worth quoting in full: "The doctrine of performance is applied (first) where there is a covenant to purchase and settle land, and a purchase is made not expressed to be made, in pursuance of such covenant, and no express settlement is made; and (second) where there is a covenant to *leave* property, and the covenantee receives a share under an intestacy.

"Upon the first branch of this doctrine the leading authorities are *Lechmere v. The Earl of Carlisle*, 3 P. Wms. 211, and *Wilcocks v. Wilcocks*, 2 Vern. 558. From these cases and from subsequent authorities it has usually been considered that the following propositions may be deduced:—

"*First.* That when a person covenants to purchase and settle lands of a certain value, and afterwards purchases lands of an equal or greater value which descend to his heir, it will be deemed a performance of the covenant.

"*Second.* Where the lands purchased are of less value than the lands

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covenanted to be purchased or conveyed and settled, they will be considered as purchased in part performance of the covenant.

“*Third.* Where the covenant points to a *future* purchase of land, it cannot be presumed that lands of which the covenantor was seised at the time of the covenant, descending to his heir, were intended to be taken in part performance of it.

“*Fourth.* It cannot be presumed that property of a different nature from that covenanted to be purchased by the covenantor, was intended as a performance.

“*Fifth.* The absence of the required consent of the trustee of the settlement will not rebut the presumption of performance, if other circumstances are favorable.

“Under the second branch (above stated) of the doctrine of performance, the cases are usually those in which a husband covenants to pay his wife a sum of money, and then dies intestate, so that she becomes entitled under the Statute of Distributions. In such cases, if the death of the husband occurs at or before the time when the covenant should have been performed, the share of the widow will be considered as a performance *pro tanto* or *in toto*, according as it is less or equal to the sum covenanted to be paid; but if the death of the husband is *after* a breach of the covenant has occurred, the widow's share will not be considered as a performance:

“Questions of this kind arise principally under marriage articles in England; and have received little, if any, judicial interpretation in this country.”

As to the distinction between “performance” and “satisfaction” of covenants, see Story, Equity Jurisprudence, sects. 1106, 1107.

PERILS OF THE SEA.

(See passage of judgment in *Nugent v. Smith*, 1 R. C. 227; No. 3 of “BILL OF LADING,” and Notes, 4 R. C. 680 *et seq.*; Nos. 74 and 76 of “INSURANCE” and Notes, 14 R. C. 271 *et seq.*, 305 *et seq.*)

Cadell v. Palmer and others, 1 Cl. & Fin. 372, 373. — Rule.

PERPETUITIES.

CADELL v. PALMER.

(APPEAL IN SUIT OF *Bengough v. Edridge.*)

(1833.)

RULE.

A LIMITATION, by way of executory devise, to take effect at the expiry of a term of twenty-one years after the determination of certain lives in being, is not void as being too remote, although the term of twenty-one years is a term in gross without reference to the infancy of any person. But if to the term in gross of twenty-one years were added any further period, although not exceeding the ordinary period of gestation, the subsequent limitation would be void.

Cadell (appellant) v. Palmer and others (respondents).

1 Clark & Finnelly, 372-423 (s. c. 7 Bligh N. S. 202 : 36 R. R. 128).

Devise. — Perpetuity.

[372] A limitation, by way of executory devise, which is not to take effect until after the determination of a life or lives in being, and a term of twenty-one years, as a term in gross and without reference to the infancy of any person, is a valid limitation. *Secus*, if to the term in gross of twenty-one years be added the number of months equal to the longest or ordinary period of gestation.

This being held to be the established rule, a decree of the Court below, declaring that a limitation by way of executory devise, which was not to vest until after the expiration of a term in gross of twenty years from the decease of the survivor of twenty-eight persons, who were living at the testator's decease, and of whom seven only were to take interests under the devise, is a valid limitation, was affirmed accordingly.

Henry Bengough, Esq., by his will, dated the 9th of April, 1818, gave and devised, from and after the decease of his [* 373] wife, Joanna Bengough, his messuage * with the gardens, stables, and other appurtenances belonging thereto, situate in St. James's-square, Bristol, to the Rev. Charles Lucas Edridge,

Cadell v. Palmer and others, 1 Cl. & Fin. 373, 374.

Arthur Palmer, the Rev. Cadell Edridge, and George Wright, their heirs and assigns forever, upon trust, for sale; and directed the proceeds to sink into and become part of his personal estate. He further gave and devised to the said trustees, their heirs and assigns, certain other real estates, upon trust, to permit his wife to occupy a part thereof during her life, and, after her decease, to pay out of the rents and profits an annuity of £300 to his nephew, George Bengough, for life, and an annuity of £200 to his nephew, Henry Bengough, for life; and subject to the payment of the said annuities, and otherwise subject, as in the said will mentioned, upon trust, from time to time, during the term of twenty-one years, to be computed from the day of the testator's decease, to collect and receive the rents and profits of all his real estates so devised to them (except the house in St. James's-square); and from time to time during the continuance of the said term, to lay out the moneys to arise from such rents and profits in the purchase of freehold estates of inheritance, in England, when and as often as there should be a surplus in hand amounting to the sum of £1500. And he directed the estates so to be purchased, to be conveyed to the trustees, upon the same trusts and conditions as were thereafter¹ limited concerning his estates thereinbefore devised; and that the trustees should not permit more than £500 to remain in bankers' hands, but should invest the same in the Three Per Cent Consolidated Bank * Annuities until [* 374] a convenient purchase could be found, and add the interest to the principal, to accumulate during the said term in the same manner as the rents and profits of the real estates were before directed to accumulate; And as to all the said trust estates and hereditaments so by him thereby devised (except his said messuage in St. James's-square), upon trust, that the trustees for the time being should retain and stand possessed of the same during the term of one hundred and twenty years, to commence from his death, if his said nephews, George Bengough and Henry Bengough, his nephew, James Bengough, his great-nephews, Henry Ricketts the younger and Richard Ricketts the younger, his niece, Ann Elizabeth Bengough, his great-niece, Ann Ricketts the younger, the ten children then living of the said Charles Lucas

¹ See the report of this case, under the "hereinbefore" to be substituted for title of *Bengough v. Edridge*, 1 Sim. 273, "hereinafter." That part of the decree where the VICE-CHANCELLOR ordered is not appealed from.

Cadell v. Palmer and others, 1 Cl. & Fin. 374, 375.

Edridge (for whose names a blank was left in the will), and the eleven children then living of the said Arthur Palmer (whose names were mentioned), or any or either of his said nephews and niece, and great-nephews and great-niece, or any or either of the said several children of the said Charles Lucas Edridge and Arthur Palmer, should so long live; and also during the term of twenty years, to be computed from the expiration or other sooner determination of the said term of one hundred and twenty years determinable as aforesaid, Nevertheless upon trust for his said nephew, George Bengough, for a term of ninety-nine years, if he should so long live, and the said terms of one hundred and twenty years and twenty years, or either of them, should so long continue; and from and after the expiration or other sooner determination of the said term of ninety-nine years, then in trust for the first, second, third, fourth, fifth, sixth, and all and every other and subsequent born son of the same George Bengough, severally and successively,

according to the priority of their births: And after the [* 375] determination of the estate *and interest of each of the same sons respectively, and also, as the circumstances of the case should require, after the determination of the estate of any person taking from time to time under, or as answering the description of heir male of his body, in trust for the person who for the time being and from time to time should answer the description of heir male of his body, or who in case of the death of his parent, if such death had taken place, would be heir male of his body, under an estate tail limited to the same son and the heirs male of his body, to hold to the same son or person respectively for a term of ninety-nine years, if the same son or person respectively should so long live; and the said terms of one hundred and twenty years and twenty years, or either of them, should so long continue, every elder of the same sons, and the person who for the time being and from time to time should answer, or who in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body, to be preferred before every younger of the same sons, and the person who for the time being should answer, or in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body.

The testator then declared several successive trusts of the said estates during the said terms of one hundred and twenty years

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and twenty years, in favour of his nephews, Henry Bengough and James Bengough, his great-nephews, Henry Ricketts the younger and Richard Ricketts the younger, his niece, Ann Elizabeth Bengough, and his great-niece, Ann Ricketts the younger, respectively, and their respective first and other subsequent born sons, and of the persons who for the time being should be, or who in case of the death of their respective parents would be heirs male of such sons respectively, similar to the trusts before stated to have been declared in favour of * the said George [* 376] Bengough, and his first and other subsequent born sons, and of the person who for the time being should be, or who in case of the death of his parent would be, heir male of the body of each of the same sons respectively, except that he directed that the estates of the said Henry Ricketts and Richard Ricketts, and of their respective sons, and of the person or persons answering the description of heirs male or heir male of their respective bodies; and also the estates of the said Ann Elizabeth Bengough, and Ann Ricketts, and of their respective husbands, and of their first and other sons, and of the persons answering the description of heirs male of their respective bodies, should respectively cease, if he or they for the time being should refuse to take the surname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the income of the said trust estates; And from and after the determination of the said respective estates and interests, then in trust for the person or persons respectively who for the time being and from time to time should answer the description of the testator's heir or right heirs-at-law; and if there should be more than one, in the same proportions, as they would be entitled to a real estate descending from the testator as the first purchaser, and vesting in him or them as his right heirs, to hold to the same person or persons respectively, if more than one, as tenants in common, as to each of the same persons respectively, for a term of ninety-nine years, if the same person should so long live, and the said terms of one hundred and twenty years and twenty years, or either of them, should so long continue.

The testator further directed that each of the said terms of ninety-nine years should be computed from the time when the person or persons respectively to whom the same were limited should become entitled to the income of all or [* 377]

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any part of the said trust estates, under the limitations thereinbefore contained; and that in case the said limitations in favour of persons unborn could not take effect precisely in the order in which they were directed, and there should consequently be any suspension of the beneficial ownership, by reason that the persons entitled to take under the same limitations or trusts should not be then born, in that case the income of his said devised trust estates should, during such suspension of ownership, belong to and be enjoyed by the person or persons for the time being entitled, or who, in case there had not been such suspension of ownership, would for the time being have been entitled to the next estate in remainder, subject nevertheless to the right of any person or persons to be afterwards born, and who would have been entitled, under any prior limitation, to receive the income of his said trust estates from his, her, or their actual birth, or respective births.

The testator then directed, that after the expiration or sooner determination of the said terms of one hundred and twenty years and twenty years, his said trust estates should be conveyed and assured by his then trustee or trustees thereof to such person or persons as would at that time be entitled to the same, either by purchase or by descent, for the first or immediate estate or estates for life, in tail or in fee in them, if the same had by his will been devised, settled, or assured to the use of his nephew, the said George Bengough, and his assigns for his life, with remainder to his first and other sons successively, according to the priority of their births in tail male, with remainder in similar estates for life, and remainders in succession to the said Henry Bengough, James Bengough, Henry Ricketts, Richard Ricketts, Ann Elizabeth Bengough, Ann Ricketts, and their sons respectively, with a proviso for the cessor of the estates of the said Henry [* 378] Ricketts and * Richard Ricketts, and their respective first and other sons, and the heirs male of their respective bodies, who for the time being should refuse to take the surname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the said income; and also for the cessor of the estate of the said Ann Elizabeth Bengough and Ann Ricketts, and their respective husbands, and their first and other sons, and the heirs male of their respective bodies, who for the time being should make a like refusal, with reversion

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to the testator's own right heirs. And he further directed, that the person or persons to whom such conveyances should be made, should have such estate in the said trust estates as he or they would at that time be entitled to take under the said limitations, if the same had been actually made by his will, with the same or the like remainders over as if the said trust estates had been devised by his will in manner aforesaid, or as near thereto as might be, and the circumstances of the case and the rules of law and equity would permit; yet, nevertheless, that no such person should have or be entitled to a vested estate or any other than a contingent interest until the expiration or sooner determination of the terms of one hundred and twenty years and twenty years; and he declared that such limitations were introduced into his will only for the purpose of ascertaining the objects to whom such conveyances should be made, and not for the purpose of making any immediate devise or gift to, or raising any immediate or present estate by way of trust or otherwise for them; on the contrary thereof, he directed that during the said terms of one hundred and twenty years and twenty years, no person or persons should be entitled, at law or in equity, to any beneficial estate in his said trust estates, or the income thereof, by way of vested interest, for any longer period than ninety-nine years, determinable as before *mentioned, and that, in the [*379] events and in the mode before expressed, heirs or heirs of the body should be entitled to take in the first instance, and as purchasers in their own right. And he directed, that if at any time during the said terms of one hundred and twenty years and twenty years, each of the male persons who for the time being should be entitled to the income of his said trust estates should require the same, it should be lawful for his trustees to convey to each or any person making such request the said trust estates, or part thereof, as he should be entitled to under the limitations thereinbefore contained, for an estate of freehold for the life of the same person, so as to give him or her an estate of freehold instead of an estate for ninety-nine years.

The testator, after giving various other directions and powers concerning the said trust estates, and after bequeathing several legacies and annuities, gave and bequeathed to the said trustees, their executors and administrators, all the residue of his personal estate whatsoever, upon trust, that they should either continue

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his moneys upon the securities upon which they should be invested at his decease, or call in the same, and sell all such parts of his residuary estate and effects as should not consist of money, or securities for money. And he directed that, during the term of twenty-one years, to be computed from the day of his decease, the trustees for the time being of his will should receive the dividends, interest, and annual income of all his residuary estate, and from time to time during such term invest all such dividends, interest, and income, and the accumulations of the same, in their names, either in the Three Per Cent Consolidated Bank Annuities, or upon mortgages of freehold hereditaments in Great Britain, as

they should think proper, as an accumulating fund, in [* 380] order to increase the principal of his residuary estate *dur-

ing such term of twenty-one years; and should, with all convenient speed, from time to time during that term, lay out and invest all his residuary estate and effects, and all accumulations thereof, in purchases of freehold hereditaments of an estate of inheritance in fee simple, in England or Wales, when eligible purchases should arise; which estates, so to be purchased, should be conveyed unto and to the use of the trustees, in fee, upon the same trusts, and under and subject to the same and the like powers, provisos, and limitations as were by him thereinbefore declared, concerning his said estates devised to them in trust as thereinbefore mentioned, or as near thereto as the death of parties, the change of interests, and other contingencies would admit; and he appointed his said trustees to be executors of his said will.

The testator died in April, 1818, and his three first-named trustees and executors shortly afterwards proved his will, and became his legal personal representatives, George Wright having renounced probate, and executed a deed of disclaimer to them as to the trust estates.

Ann Ricketts, the testator's only sister, and next of kin at the time of his death, died in the month of October, 1819, having by her will appointed the respondents, W. P. Lunell, J. E. Lunell, and George Lunell, executors thereof: and they proved the same, and became her legal personal representatives.

Mrs. Bengough, the testator's widow, died on the 10th of June, 1821, having duly made and published her will, and appointed as executors thereof the said Rev. Charles Lucas Edridge (since

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deceased), and Thomas Cadell, the appellant, who duly proved the same, and thereby became her legal personal representatives.

George Bengough, the testator's nephew, and first taker of an estate under the limitations in the will, filed * his [* 381] bill in Chancery in the year 1821 (amended in 1823), against the acting trustees and executors, and against the said Henry and James Bengough, Henry and Richard Ricketts, Ann Bengough and Ann Ricketts, the younger, and also against the said personal representatives of Joanna Bengough, the widow, and of Ann Ricketts, the sister, of the testator; and after stating the said will and his own rights under it, and as heir-at-law and one of the then next of kin of the testator, he prayed (amongst other things) that the will might be declared to be well proved, and that the trusts thereof, so far as the same were good in law, might be decreed to be carried into execution, and that an account might be taken of the personal estate and effects of the testator, and of his funeral and testamentary expenses, and debts and legacies; and that the clear residue of the personal estate might be applied upon the trusts of the will, so far as the same were effectual in law; and as far as the same were ineffectual in law, then to such person or persons as would, in such case, by law be entitled thereto: and that an account might be taken of the testator's real estates, and of the rents received by the trustees; and that what should be found due from them on taking that account might be applied upon the trusts of the will, as far as the same were good in law: and that the Court would be pleased to declare how far the trusts of the real and personal estate were good; and as far as the trusts were declared to be void, that the plaintiff might be declared to be entitled to the real estate; but, in case the trusts of the will should be considered valid, then that such of the rents and profits of the estates devised to the trustees in possession, as accrued during the life of Mrs. Bengough, might be applied in the purchase of freehold estates of inheritance in England or Wales, *and that the annuities of the plaintiff and Henry [* 382] Bengough might be paid out of the rents and profits that had accrued, and should accrue after her death; and that the residue thereof might, during the remainder of the term of twenty-one years, be also applied in the purchase of freehold estates of inheritance in England or Wales; and that such estates, when purchased, might be conveyed to the trustees upon the trusts

declared of the estates so to be purchased; and that, as often as there should be the sum of £1500 arising from the rents and profits of the devised estates, it might be laid out in such purchases of freehold estates as aforesaid; and that the plaintiff might be declared to be entitled to the immediate possession and enjoyment of the said estates so to be purchased, for the term of ninety-nine years, if the plaintiff should so long live, such term to be computed from the death of the testator; and that in case the said rents and profits should not, as soon as they amounted to £1500 be so laid out, the plaintiff might be declared entitled to the interest and dividends thereof from the time the same amounted to £1500, until the same should be laid out in the purchase of freehold estates; or that, in case the said trusts were partly valid and partly invalid, then that proper directions might be given for effectuating such of the trusts as were valid, and for declaring and effectuating the rights of the persons entitled, so far as the trusts were invalid.

The defendants having put in their answer to the bill, the cause came on to be heard before the VICE-CHANCELLOR in 1823, when an order of reference was made to the Master, who, in pursuance thereof, reported that the plaintiff was, at the time of the death of the testator, and then was, the heir-at-law of the said testator, and that the said Ann Ricketts, deceased, the [* 383] *sister of the said testator, was his only next of kin at the time of his death, and that William P. Lunell, J. E. Lunell, and George Lunell were then her legal personal representatives, and the only persons who, together with the plaintiff, and the said Henry Bengough, James Bengough, and Ann Elizabeth Bengough (the children of the said testator's late brother, George Bengough), and the said Charles Lucas Edridge, and the appellant, the executors of Joanna Bengough, the widow of the said testator, would in case of intestacy have been entitled to distributive shares of the personal estate of the testator.

Upon the death of James Bengough, the suit was revived against Sarah Bengough, his widow and personal representative; and William Ignatius Oakley, having married Ann Elizabeth Bengough, was subsequently made a party to the suit.

The cause having come on to be heard, on further directions, before the VICE-CHANCELLOR, his Honour, by a decree, bearing date the 24th day of January, 1827, ordered it to be declared

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(amongst other things) that the testator's said will ought to be established, and the trusts thereof carried into execution, &c. His Honour, in giving his judgment in respect of that part of his decree, said, "that although the rule of law be framed by analogy to the case of a strict settlement, where the twenty-one years were allowed in respect of the infancy of a tenant in tail, yet he considered it to be fully settled, that limitations by way of devise or springing use might be made to depend upon an absolute term of twenty-one years after lives in being (*Bengough v. Edridge*, 1 Sim. 267)."

From this part of the decree the personal representative of the testator's widow appealed to the House of * Lords, [* 384] and the appeal came on for hearing in February, 1832.

Sir Edward Sugden and Mr. Lynch, for the appellant, argued to the following effect:—The testator in this case had two objects in view; first, to suspend the vesting of the inheritance for a period of one hundred and twenty years, determinable upon twenty-eight lives, and for an absolute term of twenty years from the death of the survivor of them, being, as he conceived, within the rule of law against perpetuity. His second object was, during this period of suspension of the inheritance (after a period of twenty-one years allotted for accumulation), to confer the enjoyment of the estate upon, 1st, his nephew, G. Bengough, for a period of ninety-nine years, determinable on his life, and the said terms of one hundred and twenty years and twenty years, with remainder to his son (not born at the testator's decease), for a like period of ninety-nine years, determinable on his life, &c., with remainder to the grandson of his said nephew for a like period, determinable on his life, &c., with remainder to the great-grandson of his said nephew for a like period, determinable on his life, &c.; and so on, in respect of all the heirs male of the body of his nephew, George, all taking as purchasers, and all taking estates only for ninety-nine years, determinable on their lives respectively, and on the terms of one hundred and twenty years and twenty years. And he conferred similar limitations on his nephew Henry, and the heirs male of his body, &c., and on his third nephew, and the heirs male of his body, &c.; these being the persons that would take in case the inheritance was not suspended, and being the persons to whom the inheritance is to be conveyed when the suspension is to cease, and to whom at any

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time the trustees may limit an estate of freehold. We submit that the whole machinery of this will is a fraud on the [* 385] rule of law against perpetuity. *The accumulation is taken for the whole term of twenty-one years, allowed by the Thellusson Act (39 & 40 Geo. III. c. 98), and without reference to any minority or any legitimate object of settlement: and it is not until the expiration of that term that the limitations are made to commence. Accumulation and executory limitations were, by the law as it stood before the Thellusson Act, co-extensive: but a testator could not first accumulate for lives in being and twenty-one years, and then postpone the vesting for a like further period. The limitation of the estates for one hundred and twenty years, if twenty-eight persons, or any or either of them, shall so long live, taken by itself, is not objected to; but there is added a term in gross of twenty years upon the same trusts. The twenty-one years allowed by the rule after lives in being were admitted for the purposes of gestation and infancy, and were never allowed as an absolute term. Here the twenty years are taken as an independent term, merely because that term falls within the words of the rule, altogether disregarding the principles upon which it was founded. After every rule has been separately resorted to, and the time allowed by it exhausted, then comes a trust for the very persons who would be entitled to the freehold and inheritance under the previous trusts, if regular trusts had been declared for life and in tail, according to the usual form of settlements. All this machinery is a vain attempt at a perpetuity, and the consequences are obviously mischievous. Sir JOSEPH JERKILL, in the case of *Stanley v. Leigh*, defines a perpetuity, and Chief Baron Gilbert, in his Treatise on Uses, tells us what tends to it. "All limitations," he says, "that tend to the provision of a family, and to secure against contingencies that are within the parties' own immediate prospect are to be [* 386] favoured; but all limitations *that perpetuate, or tend to a perpetuity, are in themselves void, and repugnant to the policy of the law." (Gilb. on Uses, 359. When Lord NOTTINGHAM was asked, in the *Duke of Norfolk's Case*, where he would stop, he answered, "I will stop everywhere, when any inconvenience appears: nowhere before: for whensoever the bounds of reason or convenience are exceeded, the law will quickly be known." Now the time to stop has arrived: the bounds of reason are exceeded, and

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the inconvenience is manifest. The conclusion to which it is desired to bring your Lordships is, that the trusts declared of the personal estate and effects of the testator should be declared void, and the residue of such personal estate divided among the parties entitled to distributive shares thereof, as if the testator had died intestate.

In former cases the question has been, who, at a limited period after the testator's death, was to take the estate? And in the meantime either a different set of persons or the heir-at-law was to take it; but here the testator meant, that from his death there shall be taken devises under his will during the existence of the fictitious terms of one hundred and twenty and twenty years. The persons are to take, not for accumulation, not for anything collateral to the testator's general object, but as devisees; and after the expiration of one hundred and twenty and twenty years a new taker is not to be sought for, but the person then to take is precisely the same person who has taken and then is in possession under the previous limitations. Terms of years are introduced into marriage settlements and wills, for the purpose of raising portions, charges, or other sums of money, in order to provide for the necessities of families. These terms are not introduced into this will for any such purpose; and the legal estate * for [* 387] these terms is not conferred on trustees, distinct from the holders of the inheritance, in order that they may raise a sum of money for the necessities of a family. The whole legal fee simple is vested in the trustees, and they are merely directed to stand possessed of a portion of the inheritance for the terms of one hundred and twenty and twenty years. But they have no duty to perform, and the only purpose for which these terms are created is to evade the law. The law says, that a succession of life estates cannot be given to unborn issue; and yet if the limitations of this will are to be supported, there is a contrivance by which any testator may evade the law. The trusts of a term can be no otherwise limited in equity than the estate may be limited at law. It is quite clear, that the testator could not have attempted to carry his two objects into effect without the machinery of the term of one hundred and twenty years, determinable on the twenty-eight lives, and of the term of twenty years. Now if this machinery can be displaced, if part only be taken away, the whole fabric must fall. If we take away this absolute term of twenty years, the whole machinery must give way.

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We shall, therefore, first apply ourselves to this objection, that the testator has taken an absolute term of twenty years after lives in being, which is not allowed by the law. Every executory devise being, as far as it goes, a perpetuity, and being of late origin, introduced, or rather allowed, for the purpose of indulging testators in the distribution of their property, but within certain limits, it is incumbent on a party whose title depends on it, to show that it does not exceed the limit allowed. It will be for the other side to do this. What it is proposed now to do is, to state to your Lordships the several leading cases on the subject of executory devises, and the *dicta* of the several Judges; and to show your Lordships that in no one of these cases has an absolute term * of twenty years been allowed. If there be no case in which an absolute term has been allowed, then, with submission to your Lordships, we contend that the appellant's case is proved, and that the testator has exceeded the bounds allowed by law.

The earliest case which can be usefully cited, relating to executory devises, is the *Case of Matthew Manning*, 8 Co. Rep. 187. Lord Coke alludes to a few earlier cases in the Year Books, and some of them before the Statute of Wills, relating to lands which might be devised by custom, but they were all cases of executory devises, after a life in being. The *Case of Manning* was an executory bequest of a term after a life in being, and Lord Coke justified and supported it on the ground that an executory devise after a life in being was good, the utmost limit then allowed being a life in being. There is an earlier case of *Hind v. Lyon*, 2 Leonard, 11, which ought perhaps to be noticed, but is an executory devise after one life only. *Lampet's Case*, 10 Co. Rep. 46, may also be mentioned as confirming, but only as confirming *Manning's Case*. The case of *Child v. Bailey*, Cro. Jac. 459, which was decided immediately after Lord Coke's time, is an authority the other way, and although the Judges endeavoured to distinguish it from *Manning's* and *Lampet's Cases*, it is clear that the cases were not distinguishable. It was affirmed in the Exchequer Chamber by six of the Judges (Sir W. Jones, 15), and they said they would not question *Manning's* and *Lampet's Cases*, but that they would not extend the doctrine, and would not apply the doctrine therein laid down, except in cases exactly similar. The next case is that of *Pells v. Brown*, Cro. Jac. 590, called by Lord KENYON

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the Magna Charta of this *branch of the law; but all [* 389] that was decided there was the legality of an executory devise on a contingency not exceeding a life in being, and even this case was doubted by Chief Baron MONTAGUE, in the *Duke of Norfolk's Case*, to which we shall advert immediately. The next case is *Sanders v. Cornish*, Cro. Car. 230. It was a case of a term of years, and we refer to it to show that the Judges there endeavoured to revive the old doctrine, that a possibility could not be limited after a possibility. The next case is that of *Pearse v. Reccr*, Pollexfen, 29, in which the Judges also stated their determination not to go further than *Manning's Case*. The case of *Goring v. Bickerstaff*, Pollexfen, 31, is the next case, and the first case wherein the opinion of the Judges was called for respecting several lives, all in existence at the same time; and the case that comes next is that of *Snow v. Cuttler*, 1 Levinz, 135. There the Court seems rather to have retrograded, and again confined the rule to one life, for in that case they would not allow fourteen years after a life in being, even in reference to minority. However, in *Love v. Windham*, 2 Keble, 637, 1 Mod. 50, which is the next case, the Judges again allowed of several lives. In the same year the case of *Wood v. Saunders*, Poll. 35, 2 Swans. 467, was decided, the case so much relied on in the *Duke of Norfolk's Case* by Chief Baron MONTAGUE. The important case of *Taylor v. Biddal*, 2 Mod. 289, is the next in point of date, and it is the first authority that an executory devise might be limited after a life in being, and twenty-one years, in reference to minority.

The *Duke of Norfolk's Case*, called the case of perpetuity, is the next (3 Ch. Ca. 1, 2 Freeman, 72, Pollexfen, 223). The Lord Chancellor NOTTINGHAM * was assisted by the two [* 390] CHIEF JUSTICES and CHIEF BARON, who were against the executory devise; the LORD CHANCELLOR was in favour of it; and Lord Chief Justice NORTH, who decided *Taylor v. Biddal*, was one of the three Chiefs. This case was reversed, after Lord NOTTINGHAM's death, by Lord NORTH, then LORD KEEPER, but was afterwards affirmed by the House of Lords, reversing Lord Keeper NORTH's decree. The next in order is that of *Massenburgh v. Ashe*, 1 Vern. 234, 304; and the next case in point of date is that of *Lloyd v. Carew*, Pre. in Chan. 72, and Shower's Cases in Parl. 137. Upon what ground was that case decided? On the ground of twenty-one years being allowed? No; but on the

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ground that a reasonable time was necessary to be allowed to perform the condition, which could not have been executed in the life of the donor. The bill was in the first instance dismissed, but that decision was reversed in the House of Lords. After the case of *Luddington v. Kime*, Ld. Raym. 203-7, next in date came a very important case, which clearly shows that the utmost then allowed was a life or lives in being. That was the case of *Scatterwood v. Edge*, 1 Salk. 229. The Court held that twenty or thirty years was the probable result of taking lives in being, and in the general use made of taking lives in a family settlement, limiting one remainder after another, that might be a fair calculation; but when you come to talk of twenty-eight lives, the calculation must be, not twenty or thirty years, but fifty or seventy years, thereby substituting years for lives.

The cases that come next, are *Marks v. Marks*, 10 Mod. 419, and *Gore v. Gore*, 2 P. Wms. 28, 63, and *Maddox v. Staines*, 2 P. Wms. 422, and *Stephens v. Stephens*, Ca. temp. Talb. 228, which

last was decided by Lord HARDWICKE, as CHIEF JUSTICE, [* 391] and Lord TALBOT, as LORD *CHANCELLOR; and which Lord

TALBOT hoped would be a leading case in the decision of all questions of this kind. *Gurnell v. Wood*, Willes, 213, is the next case, and in that it is quite clear what Lord Chief Justice WILLES meant, taking the whole of his judgment together, for when the cases alluded to by him are *Stephens v. Stephens* and *Taylor v. Biddal*, and we have the authority of Lord HARDWICKE that before *Stephens v. Stephens*, *Taylor v. Biddal* was the only case, it is clear he must have intended the twenty-one years in reference to minority: and he says, executory devises are in wills what contingent remainders are in settlements: and, by what he says in another part of his judgment, he means that in respect of a contingent remainder, when the contingency happens, it vests in the remainder-men, but he cannot alienate until he attains twenty-one. But in respect of executory devises, which were taken from contingent remainders, the vesting, as well as the power of alienation, may be suspended until the devisee attains twenty-one. From the case of *Sheffield v. Lord Orrery*, 3 Atkins, 282, another case decided by Lord HARDWICKE as LORD CHANCELLOR, it appears that Lord HARDWICKE thought that the twenty-one years must be in reference to minority, which was the exact point which he decided in *Stephens v. Stephens*. In the same year,

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(1745), the case of *Gulliver v. Wicket* was decided in the King's Bench, 1 Wilson, 105. The limitation there, no doubt, was a contingent remainder, and in reference to the devise, and taking the whole of what is said by the CHIEF JUSTICE, it must be intended, that speaking of twenty-one years, he referred such time to minority; but at all events, the most that can be said, is, that this case left the question the same as it was before. Then came the *case of *Bullock v. Stones*, 2 Ves. Sen. 521, a [* 392] very important case, as it shows that Lord HARDWICKE retained the same opinion which he entertained in the preceding cases. *Goodman v. Goodright*, 2 Burr. 874, is the next case, in the Court of King's Bench; it is unnecessary to state the facts, but merely to refer your Lordships to what Lord MANSFIELD said. In Michaelmas Term in the same year was decided the important case of *The Duke of Marlborough v. Godolphin*, 1 Eden's Reports, 404, 418, by which it appears that Lord NORTHINGTON entertained the same opinion as Lord TALBOT and Lord HARDWICKE did, that a term of twenty-one years was not a term in gross. That case came before this House, and the same doctrine is laid down in the printed case for the respondent, signed by Mr. York and other eminent counsel, and is not contradicted by the reasons on the other side. (3 Bro. Parl. Cases, 245.) The next case that occurred, after that of *Doc v. Fonnereau*, Douglas, 470, 490, is the case of *Heath v. Heath*, 1 Bro. Ch. Ca. 147, decided by Lord THURLOW. Is not that an actual case of minority? Is it anything more than what might be effected by legal limitations? A limitation to Edward Heath for life, with remainder to his son in tail, with remainder to William Heath in fee. It is in effect that it is a devise to Edward Heath in fee, but if he should die without leaving a son at his death, capable of alienating, it should then go over. Our proposition is, that the term is not an absolute term of twenty-one years; that it has in all cases reference to infancy, and all that that case decides is, that it is not necessary that the infancy or minority should be that of the party to take, or the party from whom it is taken. The case of *Jee v. Audley*, 1 Cox, 324 (1 R. R. 46), decided by Lord KENYON, as MASTER OF THE ROLLS, *must have been erroneously de- [* 395] cided, if this term of twenty-one years be an absolute term, and so must have been the case of *Routledge v. Dorrell*, 2 Ves. Jun. 357 (2 R. R. 250), before Lord ALVANLEY, as MASTER

OF THE ROLLS; because if there may be an absolute term of twenty-one years, the testator's daughter might have appointed to issue born within the twenty-one years after her death, but it was decided otherwise. The next case of *Long v. Blackall*, 7 T. R. 102, is most important, as it contains the opinion of Lord KENYON, distinctly laid down, as to the length to which executory devises can extend. That case is also important, as being the first that allowed the time for periods of gestation at both ends of the term. Two years afterwards the case *Thellusson v. Woodford*, 4 Ves. 319, came on to be heard before Lord LOUGHBOROUGH in the Court of Chancery, assisted by the MASTER OF THE ROLLS (Lord ALVANLEY), and Justices LAWRENCE and BULLER. In that case the exact question did not arise, for there was no term of twenty-one years; it was merely a case of lives in being. But Lord ALVANLEY being afraid, from what Mr. Justice BULLER had said, that it might be inferred that the twenty-one years might be an absolute term, without reference to minority, in giving judgment, expressed himself decidedly to the contrary (see 4 Ves. 319, 326, 337). When that case came afterwards before this House, the Judges attended, and Lord Chief Baron MACDONALD delivered their opinion, and in expressing that opinion, and referring to Lord NOTTINGHAM's judgment in *The Duke of Norfolk's Case*, he says, "With an easy interpretation, we find from Lord NOTTINGHAM what that tendency to a perpetuity is, which the policy of the law has considered as a public inconvenience, namely, where an executory devise would have the effect of making lands [* 394] unalienable beyond the *time at which one in remainder would attain his age of twenty-one years, if he were not born when the limitations were executed" (11 Ves. 135). And again, he says (11 Ves. p. 143), "The established length of time during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of such posthumous child." And Lord ELDOX, in the same case (p. 146), expresses himself to the like effect, all strongly implying, that if there be a term added after lives in being, it must be with reference to minority.

But your Lordships may see the opinion of Lord ELDOX more clearly expressed in the case of *Griffiths v. Vere*, 9 Ves. 131; that opinion most clearly implies that the term of twenty-one years is not an absolute term, but qualified and referable to infancy. In

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the case of *Crooke v. De Vandes*, 9 Ves. 197, also before Lord ELDON, it was decided that a limitation, to take effect at the expiration of thirty years from the testator's decease, was too remote; and in the case of *Lade v. Holford*, Amb. 479, the suspense of property for twenty-six years was held too remote; and in *Proctor v. The Bishop of Bath and Wells*, 2 H. Bl. 358 (3 R. R. 417), the possible suspense of property for twenty-four years was held too remote.

Let us next proceed to the important case of *Beard v. Westcott*, 5 B. & Ald. 801 (24 R. R. 553). That case came on before Sir W. GRANT, MASTER OF THE ROLLS; he sent it to the Judges of the Court of Common Pleas, who returned a certificate in 1810. The effect of that certificate, if not overruled, was to allow an absolute term of twenty-one years. Sir W. GRANT was not satisfied with that certificate, and entertaining the same opinion as his predecessor, Lord ALVANLEY, as to the absolute term of twenty-one years, he sent the case back to the Court of Common Pleas, particularly *putting the question to the Judges. They [* 395] returned a certificate (5 Taunt. 392, 406), in 1813, confirming their former determination, and thereby establishing the validity of an absolute term of twenty-one years. Between these two certificates the point was most ably discussed by a very learned and able writer, who was against the validity of the absolute term of twenty-one years. The case came on afterwards before Lord ELDON, CHANCELLOR, who, not being satisfied with the certificates, sent the case to the Judges of the Court of King's Bench for their opinion. The Judges of the Court of King's Bench differed from the Judges of the Court of Common Pleas, and returned a certificate (5 B. & Ald. 814), that the devises over were void, thereby confirming the opinions of Lords TALBOT, HARDWICKE, NORTHINGTON, MANSFIELD, KENYON, and ALVANLEY, that the term was not an absolute term, but referred to minority. The case came on again upon that certificate (1 Turn. & Russ. 25), before Lord ELDON, and it was objected to the certificate, that it did not contain a sufficient answer to the case, and that it could not be collected from it, whether the circumstance, that the limitations were to take effect at the end of a term of twenty-one years without reference to the infancy of the person intended to take, created such a suspense in the vesting as to render the limitations void. But Lord ELDON said it was impossible that the Court of

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King's Bench should not have considered that point. The certificate afforded a substantial answer to the questions put, and the inclination of his own opinion was, that the Court of King's Bench was right. The question therefore, as it appears to us, is decided by all these cases. There is not a single case that can be adduced where an absolute term has been allowed after a life or lives. These decisions, and the *dicta* of all the learned [* 396] Judges to whom we have referred, *establish the contrary, and that the term must be referable to minority.

Now with respect to the text-writers, and first in respect of Mr. Fearn, the passage in his book may probably be cited to induce your Lordships to think that it was his opinion that an absolute term of twenty-one years was allowed. Con. Rem. and Ex. Dev. 431. But we submit, that the whole of his reasoning on the point, and the cases which he refers to as illustrations, warrant the contrary inference, which is, that the period of twenty-one years, which he states to be the utmost limit after a life or lives in being, for deferring the vesting of the estate, has reference to infancy. The late Mr. Cruise, in the sixth volume (445), of his Digest, and Mr. Justice Blackstone, in the second volume (174), of his Commentaries, have also laid down, that the utmost length that has been allowed for the contingency of an executory devise, is that of a life or lives in being, and twenty-one years afterwards. From the reasoning of these writers, and the cases cited by them, we are entitled to conclude, that they did not mean the twenty-one years as an absolute term. Now if the term of twenty years cannot be an absolute term, if the testator has exceeded the limits allowed by taking this term, then the whole machinery must, as we conceive, fall to the ground. In *Lade v. Holford* the whole was considered bad, and there was no modelling of it; so also it was held in *Crooke v. De Vandes*, already cited, in *Ware v. Polhill*, 11 Ves. 257, 283 (8 R. R. 144), in *Lord Southampton v. The Marquis of Hertford*, 2 Ves. & B. 54 (13 R. R. 18), and in *Marshall v. Holloway*, 2 Swans. 432 (19 R. R. 94). If, then, the term of twenty years be cut off, the consequence will be, that there will be persons *in esse*, and willing to take if they could be allowed to do so by law, during the term of twenty years. [* 397] But they cannot take during that term, because it is *void, and yet the gift over cannot be accelerated, because the testator has said that no person shall take the estate as purchaser

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until the expiration of that term, and your Lordships would not violate the testator's intentions. There is one period of time, composed of both terms, upon which the testator says, certain trusts are to arise. That period exceeds the boundary allowed by the law, and therefore all the trusts must fail. After the cases of *Goring v. Bickerstaff* and *Thellusson v. Woodford*, there can be no doubt that the vesting of property can be suspended for any number of lives, with this qualification annexed by Lord Chief Baron MACDONALD and Lord ELDON, that they are not to exceed that number to which testimony can be applied to determine when the survivor of the lives dropped. Is that the case here? Of the twenty-eight lives, twenty-one are altogether unconnected with the parties or the testator, all young and unsettled in life. These twenty-one persons may go all over the world, to the East and West Indies, to North and South America, and how could it be possible in such a case to determine when the survivor dropped. But the purposes also for which the lives are taken must be legal. In *Thellusson v. Woodford*, they were taken for the purpose of accumulation, such purposes being then legal. But what are the lives here taken for? For the purpose of supporting limitations void at law. The testator is guilty of a fraud upon the rule of law by the use he has made of the twenty-eight lives; for it is a maxim of law, that that which cannot be done directly, cannot be done indirectly. But it is said that the exility of the interests, viz., one hundred and twenty years, determinable on lives and twenty years afterwards, out of which the trusts are to arise, privileges the trusts declared at this period of time; but in referring to perpetuity, limitations are to be considered according to their legal effect, and not by the quantity of interests out of which they are *to arise; otherwise limitations held [* 398] good in one case would be considered bad in another.

The term of one hundred and twenty years is as vicious as the term of twenty years is illegal, and the trusts declared of both are void; and so also are the ulterior trusts; — the direction to convey the inheritance from and after the expiration of the terms. All the limitations therefore being void, why should the trust for accumulation be retained? The accumulation was directed for purposes not allowed by the law, then why continue the accumulation? The heir-at-law and next of kin have a right to determine it. The point which arises between them is this: the

personal estate is directed to be laid out in the purchase of lands, to be settled to certain uses, which we hold to be illegal. The purpose and object the testator had in view is not, and it cannot be, accomplished. Then what superior right or equity has the heir-at-law over the next of kin to ask the Court that the property legally belonging to the next of kin, dedicated by the testator for purposes which cannot be effected, should belong to him? Where, in the will, has the testator shown a preference to his heir-at-law over his next of kin? The case of *Tregonwell v. Sydenham*, 3 Dow. 194 (15 R. R. 40), is in point of principle in favour of the next of kin. It was decided there that the heir-at-law was entitled to all that was viciously given. Why? Because his right must be defeated by a valid disposition. Is not the same principle to be applied in case of personal estate and next of kin. Everything belongs to the next of kin in like manner as to the heir-at-law, that is not taken away by valid disposition; here nothing is taken away by valid disposition. The personal estate must therefore be considered as undisposed of, and therefore belongs to the next of kin.

[* 399] *The further consideration of the case was then adjourned, and not resumed until the session of 1833, when Mr. Preston and Mr. Wilbraham, for the respondents, argued . . . in support of the decree below. . . .

[407] Sir Edward Sugden, in reply. : . .

[410] The LORD CHANCELLOR, after suggesting that he should be glad of the assistance of the counsel in framing questions for the learned Judges, in order to dispose effectually of this question, moved to postpone the further consideration of the case, which was agreed to.

[* 411] *The learned Judges who attended, were Justices A. PARK, LITLEDALE, GASELEE, BOSANQUET, ALDERSON, J. PARK, and TAUNTON, BARONS BAYLEY, VAUGHAN, BOLLAND, and GURNEY; and the following were the questions submitted to them:—

First, Whether a limitation, by way of executory devise, is void, as too remote, or otherwise, if it is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of twenty-one years afterwards, as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person.

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Secondly, Whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the ordinary period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mère*.

Thirdly, Whether a limitation, by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the longest period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mère*.

The learned Judges attended again on a subsequent day, and Mr. Baron BAYLEY delivered their opinion as follows; first, in answer to the first question:—I am to return to your Lordships the unanimous opinion of the Judges who have heard the argument at your Lordships' *bar, that such a limitation is not too [* 412] remote, or otherwise void. Upon the introduction of executory devises, and the indulgence thereby allowed to testators, care was taken that the property which was the subject of them should not be tied up beyond a reasonable time, and that too great a restraint upon alienation should not be permitted. The cases of *Lloyd v. Carew*, 1 Show. Parl. Cas. 137, in the year 1696, and *Marks v. Marks*, 10 Mod. 419, in the year 1719, established the point, that for certain purposes, such time as, with reference to those purposes, might be deemed reasonable, beyond a life or lives in being, might be allowed. The purpose, in each of those cases, was, to give a third person an option, after the death of a particular tenant, to purchase the estate; and twelve months in the first case, and three months in the other, were held a reasonable time for that purpose. These cases, however, do not go the length for which they were pressed at your Lordships' bar; they do not necessarily warrant an inference that a term of twenty-one years, for which no special or reasonable purpose is assigned, would also be allowed; and I do not state them as the foundation upon which our opinion mainly depends. They are only important as estab-

lishing that a life or lives in being is not the limitation; that there are cases in which it may be exceeded. *Taylor v. Biddal* (1677), 2 Mod. 289, is the first instance we have met with in the books, in which so great an excess as twenty-one years after a life or lives in being was allowed, and that was a case of infancy. It was a limitation to the heirs of the body of Robert Warton, and their heirs, as they should attain the respective ages of twenty-one; there might be an interval, therefore, of twenty-one years

between the death of Robert, till which time no one could [* 413] be heir of his * body, and the period when such heir should

attain twenty-one, till which time the estate was not to vest; and that limitation was held good by way of executory devise. That, however, was a case of infancy, and it was on account of that infancy that the vesting was postponed. This case was followed by, and was the foundation of, the decision in *Stephens v. Stephens*, Cas. temp. Talb. 232. That was a case of infancy also. The executory devise there was, "to such other son of the body of my daughter, Mary Stephens, by my son-in-law, Thomas Stephens, as shall happen to attain the age of twenty-one years, his heirs and assigns forever;" and the Judges of the Court of King's Bench certified that the devise was good. The certificate in that case is peculiar; it refers to *Taylor v. Biddal*, and says, "that however unwilling they might be to extend the rules laid down for executory devises beyond the rules generally laid down by their predecessors, yet, upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years: and, considering that the power of alienation would not be restrained longer than the law would restrain it, viz., during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity: and considering that such construction would make the testator's whole disposition take effect, which otherwise would be defeated; they were of opinion that that devise was good by way of executory devise." This also was a case of infancy: it was on account of that infancy that the vesting of the estate was postponed; and though, under that limitation, the vesting of the estate might be delayed for twenty-one years after the deaths of Thomas and Mary Stephens, it did not

follow of necessity that it would; and it might vest at a [* 414] much earlier period. * These decisions, therefore, do not distinctly or necessarily establish the position, that a term

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in gross for twenty-one years, without any reference to infancy, after a life or lives *in esse*, will be good by way of executory devise; but there is nothing in them necessarily to confine it to cases of infancy; the contemporaneous understanding might have been, that it extended generally to any term of twenty-one years; and there are some authorities which lead to a belief that such was the case. In *Goodtitle v. Wood*, Willes, 213, 7 T. R. 103 n., Lord Chief Justice WILLES discusses shortly the doctrine of executory devises, and notices their progress of late years. He says, "The doctrine of executory devises has been settled; they have not been considered as bare possibilities, but as certain interests and estates, and have been resembled to contingent remainders in all other respects, only they have been put under some restraints, to prevent perpetuities. At first it was held, that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little further, viz., to a child *en ventre sa mere*, at the time of the father's death; because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience; and the rule has, in many instances, been extended to twenty-one years after the death of a person in being; as in that case, likewise, there is no danger of a perpetuity." And in citing this passage in *Theilsson v. Woodford*, 1 Bos. & P. (N. R.) 388, Lord Chief Baron MACDONALD prefaces it by this eulogium: "The result of all the cases is thus summed up by Lord Chief Justice WILLES, with his usual accuracy and *perspicuity." He [* 415] does, indeed, afterwards say (1 Bos. & P. (N. R.) 393), after noticing *Long v. Blackall*, 7 T. R. 100, "The established length of time during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of the posthumous child;" and that rather implies that he thought the rule was confined to cases of minority. This opinion of WILLES, Ch. J., though not published till 1797, was delivered in 1740; and in the minds of those who heard it, or of any who had the opportunity of seeing it, might raise a belief that there were instances in which a period of twenty-one years after the death of a person *in esse*, without reference to any minority, had been allowed; and, though there be no such case reported, it does not follow that none such was decided. In *Goodman v.*

Goodright, 2 Burr. 879, is this passage, " Lord Ch. J. MANSFIELD, says, ' It is a future devise, to take place after an indefinite failure of issue of the body of a former devisee, which far exceeds the allowed compass of a life or lives in being, and twenty-one years after, ' which is the line now drawn, and very sensibly and rightly drawn. " This was published in 1766; and, whether the last approving paragraph was the language of Lord Chief Justice MANSFIELD or the reporter, it was calculated to draw out some contradiction or explanation, if that were not generally understood by the profession as the correct limitation. In *Buckworth v. Thirkell*, 3 Bos. & P. 654 n., 10 Moore, 238 n., Lord MANSFIELD says, " I remember the introduction of the rule which prescribes the time in which executory devises must take effect, to be a life or lives in being, and twenty-one years afterwards. " In *Jee v.*

Audley, 1 Cox, 325 (1 R. R. 46), Lord KENYON (MASTER [* 416] OF THE ROLLS) says, " The limitations of personal *estate are void, unless they necessarily vest, if at all, within a life or lives in being, and twenty-one years, or nine or ten months afterwards. This has been sanctioned by the opinion of Judges of all times, from the *Duke of Norfolk's Case*, 3 Ch. Ca. 1, to the present time; it is grown reverend by age, and is not now to be broken in upon. " In *Long v. Blackall*, 7 T. R. 102, the same learned Judge says, " The rules respecting executory devises, have conformed to the rules laid down in the construction of legal limitations; and the Courts have said that the estates shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common-law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail; and until the person to whom the last remainder is limited, is of age, the estate is unalienable. In conformity to that rule, the Courts have said, so far we will allow executory devises to be good. " And, after referring to the *Duke of Norfolk's Case*, he concludes, " It is an established rule, that an executory devise is good, if it must necessarily happen within a life or lives in being, and twenty-one years, and the fraction of another year, allowing for the time of gestation. " In *Wilkinson v. South*, 7 T. R. 558, Lord KENYON says, " The rule respecting executory devises is extremely well settled, and a limitation, by way of executory devise, is good, if it may (I think it should be, must) take place after a life or lives in being, and within twenty-

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one years, and the fraction of another year afterwards." We would not wish the House to suppose, that there were not expressions in other cases about the same period, from which it might clearly be collected, that * minority was originally [* 417] the foundation of the limit, and to raise some presumption that the limit of twenty-one years after a life in being was confined to cases in which there was such a minority; but the manner in which the rule was expressed in the instances to which I have referred, as well as in text-writers, appears to us to justify the conclusion, that it was at length extended to the enlarged limit of a life or lives in being, and twenty-one years afterwards. It is difficult to suppose, that men of such discriminating minds, and so much in the habit of discrimination, should have laid down the rule, as they did, without expressing minority as a qualification of the limit, particularly when, in many of the instances, they had minority before their eyes, had it not been their clear understanding, that the rule of twenty-one years was general, without the qualification of minority. Mr. Justice Blackstone, in his Commentaries (2 Blackstone's Commentaries, 174, 16th edition), puts as the limits of executory devises, that the contingencies ought to be such as may happen within a reasonable time, as within one or more lives in being, or within a moderate term of years; for Courts of justice will not indulge even wills, so as to create a perpetuity. The utmost length that has been hitherto allowed for the contingency of an executory devise, of either kind, to happen in is, that of a life or lives in being, and twenty-one years afterwards; as, when lands are demised to such unborn son of a *feme covert* as shall first attain twenty-one, and his heirs, the utmost length of time that can happen before the estate can vest is, the life of the mother, and the subsequent infancy of her son; and this has been decreed to be a good executory devise. Mr. Fearn, in his elaborate work upon Executory Devises, lays down the rule in the same way: "An executory devise, to vest within a short time after the period of a life in being, is good;" as * in *Lloyd v. Carew*, which he states, and *Marks v. Marks*; and he says, "The Courts, indeed, have gone so far as to admit of executory devises, limited to vest within twenty-one years after the period of a life in being:" as in *Stephens v. Stephens*, *Taylor v. Buddal*, *Sabbarton v. Sabbarton*, Cas. temp. Talb. 55, 245, all of which he states, and in all of which the

vesting was postponed on account of minority only; and then he draws this conclusion, "That the law appears to be now settled, that an executory devise, either of a real or personal estate, which must, in the nature of the limitation, vest within twenty-one years after the period of a life in being, is good; and this appears to be the longest period yet allowed for the vesting of such estates." The instances put, all instances of minority, might certainly have suggested, that it was in cases of minority only that the twenty-one years were allowed; but, by stating it generally, as he did, he must have considered twenty-one years generally, independently of minority, as the rule. The same observation applies to Mr. Justice Blackstone. That such was Mr. Fearn's understanding, may be collected from many other passages in his book; but from none more distinctly than in the third division of his first chapter on executory devises (9th ed. 399, 401), where, after having mentioned as the second sort of executory devises, those where the devisor gives a future estate, to arise upon a contingency, without at present disposing of the fee, and after putting several instances, he then concludes the division thus: "And the case of a limitation to one for life, and, from and after the expiration of one day (or any other supposed period, not exceeding twenty-one years, we may suppose), next ensuing his decease, then over to another, may be adduced as an instance of the call

for the latter part of the extent to which I have opened the [* 419] *second branch of the general distribution of executory devises." And in his third chapter (p. 470), he begins his eighth division with this position: "It is the same (that is, that an executory devise is not too remote), if the dying without issue be confined to the compass of twenty-one years after the period of a life in being." And in the eighth division of the fourth chapter (p. 517), he says, "It seems now to be settled that whatever number of limitations there may be after the first executory devise of the whole interest, any one of them that is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding limitations which would carry the whole interest happens to vest." The opinion of Mr. Fearn is continued in the different editions, from the period when his work was first published, in 1773, down to the present time; but, upon that expression which occurs in *Theellusson v. Woodford*, 4 Ves. 337, showing

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that a doubt existed in the mind of Lord ALVANLEY, that doubt is introduced into a subsequent edition, for the purpose of consideration; but it does not appear to me, from anything expressed by his great and experienced editor, or in any note of his, that he thought the rule laid down by Mr. Fearne was not the right and correct rule; but, instead of that, he seems to have intimated, that his opinion was in conformity with it; because he gives extracts from what Mr. Hargrave, who agrees with Mr. Fearne, had said upon the subject, as if the inclination of his opinion was that Mr. Fearne was right, and that the unqualified rule of twenty-one years was correct. At length, in *Beard v. Westcott*, 5 Taunt. 393, the question, whether an executory devise was good, though it was *not to take effect till the end of [* 420] an absolute term of twenty-one years after a life in being at the death of a testator, without reference to the infancy of the person intended to take, was distinctly and pointedly put by Sir W. GRANT, the then MASTER OF THE ROLLS; and the Court of Common Pleas certified that it was. The point, though necessarily involved in that will, was not prominently brought forward, either upon the will itself, or upon the first of the two cases that was stated; and, lest it might have escaped the notice and consideration of the Court of Common Pleas, it was made the subject of an additional statement to that Court. The first certificate was in November, 1812; the next in November, 1813; and the Judges who signed them were Sir JAMES MANSFIELD, Mr. Justice HEATH, Mr. Justice LAWRENCE, Mr. Justice CHAMBRE, and Mr. Justice GIBBS, men of great experience, and some of them very familiar with the law of executory devises. Those certificates stood unimpeached until 1822, when the same case was sent by Lord ELDON to the Court of King's Bench, and that Court certified that the same limitations which the Common Pleas had held valid, were void, as being too remote; but the foundation of their certificate was, that a previous limitation, clearly too remote, and which was so considered by the Court of Common Pleas, made those limitations also void which the Common Pleas had held good. The subsequent limitations were considered as being void, not from any infirmity existing in themselves, but from the infirmity existing in the preceding limitation; and because that was a limitation too remote, the others were considered as being too remote also. Whether the Court of King's Bench gave any

positive opinion on that, I am unable to say. I think the Court of King's Bench would have taken much more time to [* 421] consider that point * than they did, and have given it greater consideration than it received, if they had intended to differ from the certificate that had been given by the Court of Common Pleas; but, when it became totally immaterial, in the construction they were putting upon the will, to consider whether they were or were not prepared to differ from the Court of Common Pleas, it is not to be wondered at, that that point was not so fully considered as it might otherwise have been. Upon the direct authority, therefore, of the decision of the Court of Common Pleas, in *Beard v. Westcott*, and the *dicta* by L. C. Justice WILLES, Lord MANSFIELD, and Lord KENYON, and the rules laid down in Blackstone and Fearn, we consider ourselves warranted in saying that the limit is a life or lives in being, and twenty-one years afterwards, without reference to the infancy of any person whatever. This will certainly render the estate unalienable for twenty-one years after lives in being, but it will preserve in safety any limitations which may have been made upon authority of the *dicta* or text-writers I have mentioned; and it will not tie up the alienation an unreasonable length of time.

Upon the second and third questions proposed by your Lordships, whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the ordinary or longest period of gestation, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mere*, the unanimous opinion of the Judges is, that such a limitation would be void, as too remote.

They consider twenty-one years as the limit, and the [* 422] period of gestation * to be allowed in those cases only in which the gestation exists.

The LORD CHANCELLOR (Lord BROUGHAM).—I shall move your Lordships to concur in the opinions expressed by the learned Baron, as the unanimous resolutions of the Judges. The two last questions were put with a view to comprehend more fully the question argued at the bar, and to see the origin of the rule

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That rule was originally introduced in consequence of the infancy of parties; but whatever was its beginning, it is now to be taken as established by the *dicta* of the Judges from time to time. A decision of your Lordships in the last resort, assisted here by the then CHIEF JUSTICE of the Common Pleas, in *Lloyd v. Curlew*, 1 Show. Parl. Cas. 137, settled the rule; for the whole question was there gone into. Some doubt has been expressed as to whether this principle was adopted as the uniform opinion of conveyancers. It is impossible to read the passages read by the learned Baron from Mr. FEARNE'S book, without seeing that it was the settled opinion of that eminent person, that twenty-one years might be taken absolutely. The able editor of his book was of the same opinion, and Mr. Justice BULLER'S opinion was stated by him and examined. Mr. Butler makes it a question of separate consideration, and treated the subject as Mr. FEARNE had done. The opinion of Lord MANSFIELD was the same, and the doctrine is not weakened by what Lord KENYON is stated to have said in *Long v. Blackall*, 7 T. R. 100. In the opinion of all, the rule was clearly confined to twenty-one years, as the period now understood. It was, however, necessary to state the first question, for the opinion of the Judges, and they have not shrunk from the consideration of it. It was also right to have put the other two questions, *to which the learned Judges also applied themselves, and [* 423] they have excluded the period of gestation beyond the term of twenty-one years, except where the gestation actually exists. If your Lordships be of the same opinion, you will affirm the judgment of the Court below, and dispose of this case. The rule will then be, that a limitation will not be too remote, if the vesting be suspended for twenty-one years beyond a life or lives in being; but that beyond that period it would.

The Judgment of the Court below was affirmed.

ENGLISH NOTES.

The suit of *Bengough v. Edridge*, better known to modern students by the name of the appellate case, *Cadell v. Palmer*, is identified, in the tradition of the Chancery Bar, with the suit of *Jarndyce v. Jarndyce* in Dickens' well-known description of the procedure of the old Court of Chancery. The only odd thing about that description is that the absurdity of the procedure is in no way exaggerated. Exaggeration would be impossible. In the old procedure, when an estate was

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thrown into Chancery, — or, to employ the technical expression, administered by and under the direction of the Court, — every act of administration was carried out in detail by a professional army under the direction of the CHANCELLOR or VICE-CHANCELLOR, with all the paraphernalia of the Court. There was a petition setting forth at enormous length the will and all subsequent proceedings, and the reasons for the proposed expenditure of a sum perhaps insignificant in comparison with the costs of the proceedings. The statements in the petition were echoed, with equal prolixity, by affidavits of trustees, and solicitors, and experts. Similar proceedings in the same suit have gone on from time to time from the earliest memory of the oldest Judge in the memory of the existing bar, and perhaps — in some sequestered chambers, sadly shorn of their former dignity — are going on still.

In contrast with the case of *Cadell v. Palmer*, where the testator had kept within the rule of perpetuities while stretching the rule to its utmost limit, may be cited the case of *Duke of Marlborough v. Godolphin* (1759), 1 Eden, 404. There the testator devised real estates to trustees to the use of several persons successively for their lives, with remainders to their first and other sons respectively in tail male; and directed his trustees, upon the birth of every son of each tenant for life, to revoke the uses before limited to their respective sons in tail male, and to limit the premises to such sons for their lives, with immediate remainders to the respective sons of such sons in tail male: — It was held by the LORD KEEPER (LORD NORTHINGTON) that the clause of revocation and resettling was void as tending to create a perpetuity, and being repugnant to the estate settled.

Again, it is clear law that the right of a tenant in tail to enlarge his estate into a fee cannot be restricted by any expressions of the testator, the donor of the estate. *Dawkins v. Pechyn* (C. A. 1877), 6 Ch. D. 318, and per Lord PENZANCE in the same case in the House of Lords (1878), 4 App. Cas. 51, 64, 48 L. J. Ch. 304, 39 L. T. 583, 27 W. R. 173.

The difficulty of effectually tying up property by contingent remainders probably gave rise to the various devices for tying up property by means of shifting uses (under the Statute of Uses, 27 Hen. VIII. c. 10) and executory devises (under the Statute of Wills (32 Hen. VIII. c. 5, and 34 & 35 Hen. VIII. c. 5)). And while it was held that these could not be barred by the owner of the prior estate, the rule against perpetuities came to be established, — the extreme limit of the period during which property can be tied up so as to be inalienable being, as shown in the principal case, *a life or lives in being, and twenty-one years afterwards, without reference to the infancy of any person*. — or a life or lives in being and the infancy of a person

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alive, or *en ventre sa mere*, during the existence of that life or those lives.

The rule of English law against perpetuities has been considered to be founded on public policy, and therefore applicable to an English colony; and the exception made by English law of gifts for purposes, useful and beneficial to the public, which, in a wide sense of the term, are called charitable uses, has been treated in the same light. In an appeal from the Supreme Court of the Straits Settlement, *Yeap Cheah Neo v. Ong. Cheng Neo* (1875), L. R. 6 P. C. App. 381, the Judicial Committee in their judgment expressed entire approval of the decision of the CHIEF JUSTICE, Sir P. BENSON MAXWELL, in which he laid down and acted on this principle.

1. *Tregonwell v. Sydenham* (H. L. 1815), 3 Dow. 194, 15 R. R. 40, a testator devised land after the termination of an estate tail to trustees for a term of sixty years to retain the rents and apply them in the purchase of land to be conveyed to such person as should then be in possession by virtue of his will of certain other estates therein mentioned, with such remainders over as would continue the estates as long as possible in the testator's name and blood, and after the trusts should be executed or the term expired, the estate was limited to C. for life with remainders over, and it happened that the person in possession at the time when the conveyance might have been made of the lands to be purchased as above was not in existence at the time of the testator's death; the uses were considered too remote and void, and it was held by the House of Lords, reversing a decree of the Court of Exchequer, that the effect was not to accelerate the devise to C., &c., but that the estate went as undisposed of to the testator's heir-at-law. This effect, however, is so far altered by the Wills Act, 1837 (1 Vict. c. 26), sect. 25, as to give the benefit of a devise which is contrary to law to the residuary devisee (if any).

In case of springing uses arising by a deed or by the exercise of a power created by deed the time allowed by the Rule against Perpetuities runs from the execution of the deed; and this although the deed is voidable in itself and only confirmed by a later deed. *Cooke v. Cooke* (1887), 38 Ch. D. 202, 59 L. T. 693, 36 W. R. 756. In the case of an executory devise, the time runs from the death of the testator. *Lord Dungannon v. Smith* (1846), 12 Cl. & Fin. 546, 576; *Cuttlin v. Brown* (1853), 11 Hare, 372, 382.

Where the vesting of a gift by will to an unborn person is suspended for more than twenty-one years, although without the addition of the period of a life or lives in being at the time of the death, the gift is void for remoteness. *Palmer v. Holford* (1828), 4 Russ. 403. But where the gift is to a person or a class of persons living at the testator's death,

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and who shall be living at the expiry of a certain period exceeding twenty-one years, the gift is not invalid merely by the vesting being so postponed. *Lachlan v. Reynolds* (1852), 9 Hare, 796.

In order to be good, within the rule, the gift must be such as — regarded at the time of making of the deed by the settlor, or of the death of the testator, as the case may be — must necessarily take effect, if at all, so as to be vested within the prescribed period; and if this is not the case, the gift cannot be made good by subsequent events, *Ibbetson v. Ibbetson* (1840), 10 Sim. 495, 5 My. & Cr. 26; *Lord Dungenannon v. Smith* (H. L. 1846), 12 Cl. & Fin. 546; *Pearks v. Moseley* (H. L. 1880), 5 App. Cas. 714, 50 L. J. Ch. 57; *In re Merrin, Merrin v. Crossman*, 1891, 3 Ch. 197, 60 L. J. Ch. 671, 65 L. T. 186, 39 W. R. 697; *In re Lowman, Dearnish v. Pester*, 1895, 2 Ch. 348, 363 *et seq.*, 64 L. J. Ch. 567, 72 L. T. 816. Where, according to the form of the gift, the estate might go to the children of a certain woman born after the time of the deed or death, evidence will not be permitted, in order to validate the gift, to show that the woman was past childbearing at the time in question. *Jee v. Audley* (1787), 1 Cox, 324, 1 R. R. 46; *Re Dawson, Johnston v. Hill* (1888), 39 Ch. D. 155, 57 L. J. Ch. 1061, 59 L. T. 725, 37 W. R. 51.

Where a testatrix devised estates to a daughter for life upon trust to dispose thereof unto or amongst the child or children of her daughter, to be a *vested interest* or *vested interests*, on their respectively attaining the age of thirty years, and declared that, if any child should die under the age of thirty years without issue, the share should go to the survivors or survivor, and become vested at the same time as the original shares: — Vice-Chancellor PARKER construed this as intending to give the children of the daughter vested interests in the fund, subject to be divested in the event of death before thirty without issue; and consequently that there was a valid bequest to the children of the daughter which vested in each child, so that the share of a child who died in the lifetime of the daughter passed to his representatives; and that the gift over was void for remoteness. *Taylor v. Frobisher* (1852), 5 De G. & Sm. 191. The same principle was followed in a devise of personality by Vice-Chancellor WOOD in *Re Edmonson's Estate* (1868), L. R. 5 Eq. 389. It may be questioned whether this decision was consistent with the principle of construction adopted in *Harrington v. Harrington* (H. L. 1871), L. R. 5 H. L. 87, 40 L. J. Ch. 716 (cited p. 146, *post*).

Where the gift is to a class, the class must be such that all the members of it must necessarily be ascertained and take absolutely vested interests within the period. *Leake v. Robinson* (1817), 3 Mer. 363, 16 R. R. 185. And this is not affected by the circumstance that in the events which happen, the class consists of one person only who

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might have taken; nor does that circumstance bring into operation the 33rd section of the Wills Act, 1837 (1 Vict. c. 26), which gives the benefit of a gift to a child of the testator which has lapsed, to the issue of the child. *Re Harvey, Harvey v. Gillow*, 1893, 1 Ch. 567, 62 L. J. Ch. 328, 68 L. T. 562, 41 W. R. 293. But where there is a gift over in the event of a daughter of the testatrix having died "leaving children the interest to be appropriated for the maintenance and education of such children (at the discretion of certain persons) . . . and the principal to be divided amongst them as they shall severally attain the age of twenty-five years," with a gift over if the daughter died without issue, it was held that the gift was not void for remoteness, but that the fund vested in the children of the daughter living at her death. *In re Bevan's Trusts* (1887), 34 Ch. D. 716, 56 L. J. Ch. 652, 56 L. T. 277, 35 W. R. 400. The gift over on death of the daughter without issue was held to be a circumstance indicating that the attainment of twenty-five was not looked upon as a contingency essential to the gift to the several children.

In one case where there was a gift to "such of the children of my daughter H. by her first husband, and the children of my daughter C., who . . . shall attain the age of twenty-five years;" there were children of the daughter H. living at the testator's death; *MALINS, V.-C.*, construed the will as confining the class to the children who were living at the testator's death (on the principle of *Viner v. Francis* (1789), 2 Bro. C. C. 658, where a gift to "children" of a deceased sister was construed as confined to such children as were living at the testator's death); and so held that the gift was not void for remoteness. *Picken v. Matthews* (1878), 10 Ch. D. 264, 48 L. J. Ch. 150. This seems at least a strained construction; and where there was a gift to all the children of a son who should attain twenty-five, with a gift over in case any child died under twenty-five, leaving children, &c., *NORTH, J.*, held that the whole gift failed. *Re Whitten, King v. Whitten* (1890), 62 L. T. 391.

If the use is to arise, or the devise to take effect, only after an indefinite failure of issue of X., who is a stranger to the estate, it will be void as against the rule. *Badger v. Lloyd* (1800), 1 Ld. Raym. 526, 1 Salk. 253; *Harding v. Mott* (1857), 7 Ell. & Bl. 650. But if there is a previous estate tail (general) in X., the gift over is a good remainder; *Badger v. Lloyd (supra)*: cf. *Lady Lanesborough v. Fox* (1733), Cas. temp. Talbot, 262; and in the case of a will, the failure of a gift over to Y. on the death of X. without issue (which was formerly construed as a gift over upon an indefinite failure of the issue of X.) was avoided, if possible, by construing the will so as to give an estate tail by implication to X. *Doe d. Ellis v. Ellis* (1808), 9 East, 382. This construction is much restricted in case of wills governed

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by the Wills Act, 1837 (1 Vict. c. 26), sect. 29: by which such words as "die without issue," &c., are, unless a contrary intention appear by the will, construed to import a failure of issue in the lifetime of the *propositus*. And on that construction the subsequent gift may take effect as an executory devise. *Roe v. Jeffrey* (1798), 7 T. R. 589.

Where, however, there is a gift to a class who can take by way of contingent remainder, a rule of construction has been adopted by which the class has been in effect limited to those who are ready to take upon the determination of the prior estate. Thus, in *Festing v. Allen* (1843), 12 M. & W. 279, a testator devised his estates to X. and Y. to the use of a grand-daughter (M.) for life, "and from and after her decease to the use of all and every, the child or children of M. who shall attain the age of twenty-one years," to hold as tenants in common, and not as joint tenants, and to their several and respective heirs, &c., "and for want of any such issue," to other uses. It was held that M. was tenant for life with a contingent remainder in fee to such of her children as should attain twenty-one; and as no child had attained twenty-one at the death of M., when the particular estate determined, the remainder failed, and subsequent interests failed also. This was followed by Vice-Chancellor KINDERSLEY in *Rhodes v. Whitehead* (1865), 2 Dr. & Sm. 533, and by NORTH, J., in *Symes v. Symes*, 1896, 1 Ch. 272, 65 L. J. Ch. 265, 73 L. T. 684, 44 W. R. 521. In the latter case, by the exercise of a power created by marriage settlement, an estate in fee was given after the death of the survivor of the appointers (husband and wife) to such of the children of the appointers as should attain the age of twenty-five as tenants in common. NORTH, J., held that this was a contingent remainder to the children who should attain twenty-five in the lifetime of the survivor; and inasmuch as the condition of attaining the prescribed age must be fulfilled at the determination of the prior life estate, it was immaterial whether the age was twenty-one or twenty-five.

If there are clear words showing that the class is to include persons coming to answer the description as well after as before the determination of the previous estate, the gift cannot be construed as a contingent remainder, and will take effect, if at all, as an executory devise. The cases of *Re Lechmere and Lloyd* (1881), 18 Ch. D. 524; *Miles v. Jarvis* (1883), 24 Ch. D. 633, 52 L. J. Ch. 796; *Dean v. Dean*, 1891, 3 Ch. 150, 60 L. J. Ch. 553, 65 L. T. 65, 39 W. R. 568; *Blackman v. Fish* (C. A.) 1892, 3 Ch. 209, 67 L. T. 802, are instances of this. In these cases there was nothing in the Rule against Perpetuities to prevent the whole class participating.

To make a good power of appointment the power must be given to a person who is necessarily ascertainable within the period allowed by the Rule against Perpetuities from the date of the instrument or death

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of the testator (as the case may be) creating the power. *In re Hargreaves, Midgley v. Tuttle* (C. A. 1890), 43 Ch. D. 401.

There may be a good gift of a life estate to an unborn child; but a gift following such a life estate can only be good if the person to take is necessarily ascertainable within the period allowed by the Rule against Perpetuities. *Ibid.*

A limitation depending or expectant upon a prior limitation which is void for remoteness is itself invalid (*Brudenell v. Elwes* (1801), 1 East, 442, 6 R. R. 310; *Beard v. Westcott* (1822), 5 B. & Ald. 801, 24 R. R. 553, Turn. & Russ. 25; *Monypenney v. Dering* (1852), 2 De G. M. & G. 145, per Lord ST. LEONARDS, p. 282): but limitations in default of appointment under a power which is void for remoteness, are not necessarily invalid unless they are themselves obnoxious to the Rule against Perpetuities. *In re Abbott, Peacock v. Frigout*, 1893, 1 Ch. 54, 62 L. J. Ch. 46, 67 L. T. 794, 41 W. R. 154.

The cases in which it has been attempted to tie up personalty upon trusts by way of strict settlement bristle with fine distinctions, and have been attended with great differences of opinion among learned Lords in the ultimate Court of Appeal. It seems the most instructive way of dealing with these cases to select the cases which have been, within recent times, fully argued and considered in the House of Lords, and to state with some minuteness the points of the cases and the reasons given for the decisions.

In the case of *Lord Dungannon v. Smith* (1846), 12 Cl. & Fin. 546, —already cited as an authority for one of the propositions already stated, —a testator, being entitled to leasehold premises for years, bequeathed them to trustees, on trust to permit his grandson B. to take the profits thereof during life, and from and after his decease to permit such person who for the time being would take by descent as heir male of the body of the said B., his grandson, to take the profits thereof until some such person should attain the age of twenty-one years, and then to convey the same unto such person so attaining the age of twenty-one years, his executors, administrators, or assigns: but if no such person should live to attain the age of twenty-one, then in trust to permit such person and persons successively, who for the time being would take by descent as heirs male of the body of the testator's son (father of B.), to take the profits of the same leasehold premises until one of them should attain the age of twenty-one, and then to convey the same to such heir male first attaining that age, his executors, administrators, or assigns.

At the death of B., the grandson, his son and heir A., had attained the age of twenty-one, and with the consent of the trustees contracted to sell the leaseholds. Upon a bill filed by the next of kin of the tes-

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tator, it was held that the gift under which A. claimed was void for remoteness, and that the next of kin were entitled to the property.

On the facts above stated the question was put to the Judges, whether A. was capable of making a good title to the leaseholds; and this was answered in the negative by the majority: PLATT, B., CRESSWELL, J., WIGHTMAN, J., ROLFE, B., MAULE, J., COLTMAN, J., WILLIAMS, J., ALDERSON, B., and TINDAL, Ch. J., against PATTERSON, J., and PARKE, B., who thought A. was capable of making a good title.

The argument in favour of the opinion adopted by the minority, is thus put by Mr. Baron PARKE (12 Cl. & Fin. 603, 605): "It is clear that, according to the true construction of the words of this conjoint bequest of both profits and *corpus*, reading them at the testator's death, *some* benefit would belong to the person who should be at the death of B. heir male of the body in whatever degree of descent he may be such, and would necessarily take effect within the limits, for that heir *must* have, *either* the rents and profits, or the estate, at the death of B. The heir male of the body then in existence would, if a minor, take the profits instantly, and would, if he attained twenty-one, take the *corpus*, or if already twenty-one would take the *corpus* (for surely the testator's words are not to be construed to mean, that to take any benefit at all he must *be a minor* when B. dies); so that, though each of the two limitations, if it had stood alone, would be void, because it could not be predicated of it, that it would ever take effect, if at all, within the prescribed period, yet, taken together as one bequest of both, they must have effect in some way, and within the limits: they cannot be separated without defeating the testator's intention as expressed in the bequest; and the first heir male *must* take, and within the proper limits, either one or the other of the benefits given by the testator. Immediately on the death of the tenant for life the trustees must do something with the profits or estate; if the heir be a minor, they must give the profits, if a major, convey the *corpus*. There is no interval, no suspense of enjoyment of the estate for a moment, and no uncertainty, except as to the amount of the benefit, which also must be determined within the proper time. In the cases of a separate bequest of the profits alone, and a separate bequest of the *corpus* alone, no heir male of the body can take, except as fulfilling the condition of being heir male minor in one case, and heir male major in the other, neither of which conditions will be *necessarily* fulfilled within the limits; but under the bequest in question, of both, he who fills the character of heir male of the body *at the death of* B., be he the son, grandson, or other more remote descendant of B., *must, as such heir of the body, and simply because he is heir of the*

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body at the time of the death of B., necessarily take, and take then *either* the profits or the *corpus*, that is the inevitable result of the words used; and, therefore, the case is the same in effect, as if the testator had so said, and had expressly directed the trustees, at the death of B., to give the profits to the heir male *then in being*, if a minor, and the estate, if he should be a major; and if he should die under twenty-one, then to the next, if a minor, and the estate if a major, and if that heir should die under twenty-one, then to the next, and so on, in a series of consecutive limitations, as suggested by Mr. Napier. A direction to give, after the death of B., to the first heir male who should be a minor, the profits, and the first heir male who should attain twenty-one, the *corpus*, in effect is the same thing as a direction to give the *first heir male* living at the death of B., *either* the one or the other, according as he was a minor or major; and a bequest in these terms would be, not indeed, a bequest to an individual defined, but a bequest to an undefined one, who required no other condition to take it, than fulfilling the character of heir of the body in existence at the death of B. There is a trust for the person who should fill that character, under all possible circumstances."

The ground of the opinion of TINDAL, Ch. J., which may be taken as a sample of the opinions of the majority, was stated by him as follows (12 Cl. & Fin. 612-615): "The bequest to the trustees, 'in trust, after the decease of B., to permit such person who for the time being would take by descent as heir male of the body of B., his grandson, to take the profits thereof until some such person should attain the age of twenty-one years, and then to convey the same unto such person so attaining the age of twenty-one years, his executor, administrators, or assigns,' is a bequest void in law; being a bequest not so limited as necessarily to vest and take effect within the period of time prescribed by law for that purpose, but, on the contrary, a bequest, the vesting of which may be deferred during many successive minorities, without any definite limits whatever in respect of time. For there are two well-known rules of law, applicable to the vesting of all executory trusts and limitations, which are so thoroughly established as to admit of no exception or contradiction to their authority. The one is, that the executory trust or limitation not only *may*, but necessarily *must* take effect (if it takes effect at all), within the period of a life or lives in being, and twenty-one years after, with a sufficient allowance in addition for the birth of a posthumous child. The other rule is, that if, at the time of its creation, the limitation is so framed, as not *ex necessitate*, to take effect within the prescribed period, that is, if it is bad in its inception, it will not become valid by reason of the happening of subsequent events which may bring the time of its actual vesting

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and taking effect within the period prescribed by law. Indeed, neither of these rules was in any manner disputed on the part of the appellant at your Lordships' bar; but the argument on his part was, that upon the proper construction of the bequest a distinction was to be made between A., the first taker under it, and those who follow him in succession. It was contended, that wherever a series of successive contingencies is provided for, each subsequent contingency being in substitution of the preceding, the prior contingency is to be considered independently of those which follow it; that you must sever the case of the first taker from the subsequent contingencies substituted in its place; and upon that principle, that inasmuch as A., in the present instance, had actually attained twenty-one before the testator's death, and was living at his death, and would have been entitled, if under twenty-one, to have received his profits, so A., at all events, was clearly entitled to have the leaseholds conveyed to him, although all the limitations subsequent to his might be too remote. And the learned counsel for the appellant further contended, that the trust declared by the will as to the leaseholds might be expanded thus: namely, that the trustees were directed, 'upon the death of B., to permit the person who might then be his heir male to take the profits; if he attain twenty-one, to give him a formal assignment of the legal estate; if he died under twenty-one, then that the person who might be next heir male was to take the profits;' and so on through the series. Nor was any question made, on the part of the appellant, as to any particular *intention* on the part of the testator. It is obvious, indeed, that he could have had no intention as to any particular individual who should take after B.'s death, but that it was equally indifferent to him whether A. should take, or A.'s son, or A.'s grandson; all that he would have answered, if asked upon the subject, would probably have been, in the words of the will, 'Some male descendant of B., who had attained twenty-one.' The testator, not foreseeing the difficulty, nor being aware of the rule of law, would probably have given the very same answer, if he had directed in his will that the first heir male of the body of B. should take who attained the age of twenty-five. The question, therefore, is not a question of intention of the testator, but of construction of the will; viz., whether the bequest is void by reason of the remoteness of the time of its vesting? And it appears to me, in the first place, to be manifest that there is no absolute necessity that there should be an heir male of the body of B. who should attain twenty-one within twenty-one years after his death, but that a series of minorities may ensue for a longer period, and consequently that the bequest is void under the first rule; and again, that the circumstance of A. attaining twenty-one having happened before B.'s death, does

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not, under the second rule, remove the difficulty. I am unable, upon the plain and necessary construction of the words of this will, to discover anything to warrant the distinction contended for between the case of the first taker and those which follow. The will contains one description, and one description only, of all who are to take under it; a description which applies equally to all who compose the whole series of takers. The attaining of the age of twenty-one is made part of the integral description of every one who is to take, as well of him who is to take first, as of all who follow after him; it is made, as it were, a condition precedent that the taker is to be twenty-one, whoever he may be; so that there seems to be no ground furnished by the will itself for any distinction whatever, between the son of B. and his grandson, or any more remote male descendant who might first attain twenty-one after the death of B.; and if so, the argument upon which any severance can be made between the bequest to the first person who should take under the description in the will, and any who follow in the line, falls to the ground. For as to the direction that the trustees shall permit 'such person who for the time being would take by descent as heir male of B., to take the profits thereof, until some such person should attain twenty-one,' which was mainly relied upon in favour of the appellant, — such direction is quite independent of the bequest of the leasehold itself, and appears to me to have no more bearing on the construction to be put on the subsequent bequest of the leasehold itself than if such intermediate profits had been directed to be paid to an absolute stranger."

The Lords present, the LORD CHANCELLOR (LORD LYNCHURST), Lord BROUGHAM, and Lord CAMPBELL, unanimously agreed with the opinion of the majority of the Judges. The following extract from the speech of the LORD CHANCELLOR contains the gist of the reasons upon which they decided (12 Cl. & Fin. 622-626): "The disposition of these leasehold premises, of the *corpus*, was to be to a person answering two descriptions. He was to be heir male of the body taking by descent from Arthur Trevor, the grandson, and he was to be of the age of twenty-one years. It is quite obvious that those two circumstances might not combine for many generations, and indeed it is possible that they might never combine. It is obvious, therefore, that this disposition of the property is void for remoteness; for, as everybody knows, property of this description must vest, if at all, within a life or lives in being, and twenty-one years afterwards; and, to speak with perfect correctness, a few months for gestation. It is wholly immaterial in this case, that there was a person twenty-one years of age answering the description at the time; that is, to make use of a

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phrase of a noble Lord in the case of *Tollemache v. The Earl of Coventry* (2 Cl. & Fin. 611) that was a pure accident; it might or might not have happened. Unless it is absolutely certain that the event must happen within the period prescribed, it is quite clear that the rule of remoteness applies to the case, and the devise becomes altogether void. It is quite unnecessary to refer to the several cases which are mentioned in the papers upon your Lordships' table in support of this position. It is admitted on all hands, and it is a point so certain and so clear, that it does not admit of dispute. But, my Lords, it is supposed that this gift of the *corpus* of the estate is operated upon in some degree by the disposition of the intermediate rents and profits. The disposition of the intermediate rents and profits is to the person who for the time being should take by descent as heir male of the body of the grandson, until some such person shall have attained the age of twenty-one years. Now the disposition of the *corpus* of the estate is to a party answering two descriptions or qualities. The intermediate rents and profits are taken by a person or persons who answer one of those descriptions. It appears to me, that the dispositions can exist entirely unconnected with each other, that they have no necessary relation to each other, and that the disposition of the rents and profits to particular individuals under this will, no more affects the disposition of the *corpus* of the estate, than if that disposition had been to mere strangers. On that point I concur with the opinion expressed by several of the Judges, in the course of the argument which they have addressed to your Lordships. But then an attempt to obviate these conclusions, and to decide this question in favour of the appellant, has been made by putting or endeavouring to put a particular construction upon this will, or rather by endeavouring to translate the will into another form, and then upon that translated form to put the construction to which I am adverting. The course that is pursued is this: it is said that it was the intention of the testator—or that you may infer from that disposition that such would have been the intention of the testator—to create successive estates; that the first estate would, under the circumstances that have taken place, not be a void estate for remoteness, but would take effect, and although the subsequent estates become void from remoteness, that would not affect the first estate, to which that defect would not apply. Several cases were cited for the purpose of leading to that conclusion. I do not refer to those cases, because I do not think the principle can be disputed, that if the first estate in the order of succession is not void for remoteness, if it is a good estate, it would not be affected by the fact of the successive estates being void on that account. It is a principle conceded, and I need cite no authority for that purpose. Then what is the estate

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created, or that is supposed to be created? It is of this description: The testator intended the rents and profits to be enjoyed by the first descendant answering the description, until such person shall attain the age of twenty-one years, and then to convey the estate to that person: If the first taker should not attain the age of twenty-one years, then he intended, upon the death of the first taker, that it should go to the next descendant in the order of succession: If he should attain the age of twenty-one years, then the *corpus* of the estate was to be conveyed to him, and if he did not attain the age of twenty-one years, the rents and profits were to be enjoyed by the intermediate person in succession, and so on; in fact, that there was to be a succession of estates of the nature I have described; and then it was insisted, that the first estate so created should not be void for remoteness, although the subsequent estates should be void; that would not affect the original first estate. Now, as it appears to me, looking at this will, the testator had one single object, which was to point out some individual at some future period answering a particular description, who should take this estate. He had not in contemplation the granting of successive estates in the terms which I have stated, and which are stated in the arguments of two of the learned Judges; he had no such idea in his contemplation; and if we were to adopt this construction for the purpose of getting out of the difficulty arising out of the law of perpetuities, we should be, in fact, as I consider, making a perfectly new will for the testator. We should be, in the first instance, translating the actual will into a new form, and we should be putting upon that will a construction which, I admit, if the will had been in that form, would have been the true and just construction. I never can lend myself to a measure of this kind, to the process of altering the frame of a will and the phraseology of a will, for the purpose of framing, as it were, a new will, in order to put a construction upon it to obviate the difficulties arising out of the law against perpetuities. There is another difficulty in this case; a difficulty adverted to by many of the learned Judges; — if you can apply such a process in this case, you could have applied it in almost every case where there was a decision that the estate was void in consequence of remoteness. I will take, for instance, the case which was referred to by many of the learned Judges, the case of *Jee v. Audley*, 1 Cox, 324 (1 R. R. 46). What was the case? A bequest of £1000 to the children of John and Elizabeth Jee, upon Mary Hall's dying without issue, or upon failure of the issue of Mary Hall. At the time of the testator's death there were four daughters. When the case came before the MASTER OF THE ROLLS, Lord KENYON, he decided that that bequest was void on this ground, that, in fact, after the death of the testator, another daughter might be

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born, it would be void as to her, and therefore void as to the whole set. On that ground the principle of the case was decided: and the case has never been questioned from that time to this; but apply to that case the process which has been suggested in the present case (and it would equally apply), and see what the effect would be to the existing daughters who should be living at the time of the event happening; if there were no other daughters born in the meantime, and if there were another daughter born in the meantime, then to the existing daughters and that daughter, what would be the result? As far as relates to the last disposition, it would be void: as far as relates to the first disposition, it would be perfectly good. And the same principle would apply to almost every case in which the Court has decided against the validity of a bequest in respect of its remoteness. What would be the effect, then, of introducing a new principle of this kind? It would break down all the decisions upon this subject. It would remove all those landmarks of the law which have been now for some time considered as firmly established; and I protest, therefore, against the doctrine which has been attempted, for the first time, to be introduced into this case."

In *Christie v. Gosling* (1866), L. R. 1 H. L. 279, 35 L. J. Ch. 667 (an appeal from *Gosling v. Gosling* (1862), 1 De G. J. & S. 1, 32 L. J. Ch. 233), a testator directed that his share in a certain banking business should be offered in succession to nephews, sons of G., born in testator's lifetime. He bequeathed to trustees a sum of £50,000 upon trust to purchase in fee simple a mansion house and premises, and to hold the same — after the acceptance of the partnership by one of the persons named — to the use of the person accepting the share (as above) for life, with remainders to the first and other sons of such accepting nephew in tail, with remainder to the use of his nephews (sons of G.) born in the testator's lifetime subsequently to the one who should so accept severally and successively, &c., and he bequeathed his residuary personal property, on the same trusts as were directed concerning the lands to be purchased as aforesaid, "or as near thereto as the rules of law and equity will permit: provided nevertheless, and I hereby declare that the said accumulations and personal estate shall not, nor shall any part thereof, vest absolutely in any tenant in tail unless such person shall attain the age of twenty-one years." He left a (3rd) codicil concluding as follows: "It is my particular desire that no one shall be put in possession of my estate, or shall enjoy the rents, dividends, and profits of any part thereof, or of any property left by my will or codicils, until he shall attain the age of twenty-five years; and in the meantime the rents and profits to accumulate." The offer of the share in the banking business was accepted in due course (on coming of age) by a

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nephew (Ellis Gosling) who was in minority at the time of the testator's decease. Ellis Gosling died in January, 1861, leaving an only daughter him surviving, but a month afterwards a son was born, who by his next friend was plaintiff in the suit and respondent in the appeal to the House of Lords. The cause having come, in the first instance, before Sir J. ROMILLY, M. R., he made a decree to the effect that, subject to the life interest given to Ellis Gosling, the testator's residuary personal estate and the accumulations made during the minority of Ellis Gosling were not effectually disposed of, and went to the next of kin of the testator.

The plaintiff having appealed from this decree, the case was argued before the LORD CHANCELLOR (Lord WESTBURY), by the Solicitor-General (Sir Roundell Palmer) and Mr. Osborne, for the appellant, and by Sir Hugh Cairns and Mr. Charles Hall, for the next of kin.

Lord WESTBURY reversed the decree of Sir J. ROMILLY, upon an extremely subtle argument, which cannot be fairly represented without setting it out in full (1 De G. J. & S. 13-17): "The question I have to decide," he said, "depends on the true construction of this proviso. The expression 'tenant in tail' in the proviso must mean a person who takes the real estate in tail under the limitations thereof, and who also takes the personal estate under the trusts that are by reference declared of it. For the tenant in tail described is one in whom, but for the proviso, the personal estate would vest absolutely, that is, vest without being subject to be divested. The proviso is intended to provide for an infant tenant in tail taking an absolute interest in the personal estate under the trusts which are declared of it, and afterwards dying during his infancy. But inasmuch as personal property does not pass by descent, and there can be no estate tail in it, the proviso must apply to such tenants in tail only of the real estate as take the personal estate (if I may use an incorrect expression) by purchase under the trusts declared by the will, and the question is, whether such tenants in tail include any tenant in tail taking by descent. As I read the judgment of the MASTER OF THE ROLLS, he assumes the fact to be, that the proviso includes and applies to tenants in tail taking by descent under the limitations of the devised real estates, as well as those taking by purchase. The correctness of this conclusion depends on the inquiry, whether the disposition made by the will of the personal estate contains or involves any trust for a tenant in tail who takes the real estate by descent. Before entering on that inquiry, I ought to observe first, that it is clear that the trusts of the personal estate are not executory in the proper sense in which that word is used in this Court. If they were, there would be no illegality. Secondly, it is well settled that the disposition made of the personal estate is

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not extended or altered by the words 'as near thereto as the rules of law and equity will admit.' The personal estate is bequeathed by words of reference. The trustees are to stand possessed of it upon such trusts, and for such estates and interests, as are declared concerning the real estates. I will state concisely, so far as is necessary, the uses of the real estate, and then the corresponding trusts of the personalty, premising (what it is hardly necessary to mention) that words creating an estate tail in realty confer the absolute ownership in personal estate. The uses of the real estate stated shortly (and substituting the name of Ellis Gosling, the nephew who accepted the partnership, for the description of such nephew) are the following: To the use of Ellis Gosling for life, with remainder to the use of the first and other sons of Ellis Gosling in tail male, with remainder to the other sons of the testator's brother Robert younger than Ellis who should be *in esse* at the testator's death, severally and successively for life in the order of seniority, with remainder to the first and other sons of such younger sons respectively in tail male, with remainder to subsequently born sons of Robert for life, with remainder to their first and other sons in tail male in like manner, with remainder to the testator's brother Thomas George Gosling for life, with remainder to his first and other sons in tail male, with divers other remainders, which it is not necessary to detail. Now what are the trusts of the personal estate, which, so far as the difference of tenure will admit, will be identical with these uses of the real estate? I will state them first without the proviso, and then show the effect of the proviso and to what persons it will apply. The first trust of the personalty would be to pay the dividends, interest, and income to Ellis Gosling the nephew during the term of his natural life, and after his decease the trustees would hold the personal estate and the income thereof upon trust for the first or only son of the said Ellis Gosling, his executors, administrators, and assigns. Here, but for the proviso, the trust would stop, and could not be extended to the second and other sons of the tenant for life; for the next trust directed by the words of gift of the personal estate without the proviso would be a declaration that in case there should be no son of Ellis Gosling, the trustees should hold the personal estate upon trust to pay the income to the next younger brother of Ellis Gosling for life, and after his decease upon trust as to principal and interest for his eldest or only son absolutely, with a gift over in like manner as before to the next tenant for life of the real estates, and so on throughout the series. But when you add the proviso to the disposition of the personal estate, which is made by the words of reference, the effect is this, that a new trust is created, in the event of any tenant in tail taking the personal estate under the trusts I have described and

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dying under the age of twenty-one years, for the next succeeding tenant in tail or tenant for life, as the case may be; but it is plain that the proviso attaches only to tenants in tail taking by purchase, for no tenant in tail by descent can take the personal estate under the disposition which is made of it. The only object and effect of the proviso, are to substitute the next tenant in tail or tenant for life, as the case may be, taking by purchase for the preceding tenant in tail, also taking by purchase, in case such preceding tenant in tail dies under the age of twenty-one years. It is true that a contingency very material to be provided for is not included in this proviso. A tenant in tail taking the real and personal estate as a purchaser may marry and have a son, and afterwards die before attaining the age of twenty-one years, leaving such son tenant in tail of the real estates. In such an event the proviso transfers the personal estate to the next purchaser in the series of limitations, and it becomes severed from the real estate, which descends to the son of the deceased tenant in tail. This event is not provided for, but that circumstance does not authorise any different interpretation of the proviso. If the will had provided for the event of a tenant in tail by purchase dying under twenty-one leaving a son, by declaring an express trust for such son of the personal estate, the case would have existed of a tenant in tail of the real estates by descent taking the personal estate by purchase; and if in that case the proviso were held to apply to and include such tenant in tail, the whole disposition of the principal of the personal estate would be void for remoteness. But no such trust is, in my opinion, either expressed or implied, or in any manner warranted by the words of gift of the personal estate either with or without the proviso. Again, if the words of gift of the personal estate taken with the proviso could possibly be interpreted to amount to a trust of the *corpus* of the personalty for such tenant in tail only under the limitations of the real estate as should first attain the age of twenty-one years, so that in the words of the MASTER OF THE ROLLS the attaining twenty-one would be a precedent condition to the vesting, it would follow that the gift of the *corpus* of the personal estate would be void for remoteness. But in my judgment it is not possible to put any such construction on this will. I am of opinion, therefore, that the disposition of the personal estate made by this will is good in law."

From this decree of Lord WESTBURY the testator's next of kin appealed to the House of Lords, where (on the opinion of the majority of the Lords present) Lord WESTBURY's decree was reversed and that of Sir J. ROMILLY, M. R., affirmed.

The majority, Lord CHELMSFORD, L. C., and Lord CRANWORTH, substantially adopted the reasoning of Lord WESTBURY. Lord ST.

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LEONARDS came to a contrary conclusion. After some general observations, he said (L. R. 1 H. L. 294): "I may relieve the case from some questions upon which I consider that both parties are agreed, and which, in my opinion, are not open to doubt. The trusts are not executory, but *executed*. The testator was his own conveyancer, and the trusts cannot, speaking generally, be treated as valid, and the proviso is only void within the authority of *Egerton v. Brownlow* (4 H. L. C. 1). In this case, therefore, we must construe, not reject the proviso. Although I have said that this will is to be technically construed, yet, of course, the intention of the testator is to be collected from the technical expressions in the will. Let us first consider the question in that light, independently of the question upon the law against perpetuity, and then consider whether that law affects the validity of any of the gifts." After an elaborate consideration of the will, and of the contrary judgment, he concluded with the following criticism of the proviso. "According to this argument," he said, "issue in tail taking by descent under a gift to the parent in tail, are not to be considered as taking an estate tail under the gift, when the estate descends to them. Now, the original limitation is necessarily to the parent and the heir or heirs male of his body: no doubt he is the devisee, and is in as a purchaser; but the words, 'heir or heirs male of the body,' create an estate tail or in tail male, descendible to the issue named, and when the descent takes place, the issue become in succession tenants in tail; and although their title wholly depends upon the devise to the ancestor with the superadded words of limitation, yet in a due course of succession they are strictly tenants in tail under the will. It is in this sense that the testator speaks of any tenant in tail. In the lifetime of a father, tenant in tail of an estate, you would predicate of his son that, if he survived his father, he would be tenant in tail of the property. I am clearly of opinion that this is the true construction of the words. The decree of the LORD CHANCELLOR should, I think, be reversed, and the decree of the MASTER OF THE ROLLS affirmed."

The result of the judgments above fully stated in *Gosling v. Gosling* and the appeal *Christie v. Gosling* seems to come to little more than this, that the words "tenant in tail," in the proviso in this particular will, referred to a tenant in tail who should take by purchase under the previous limitations. And so in the subsequent case of *Harrington v. Harrington* (1871), L. R. 5 H. L. 87, 40 L. J. Ch. 716, the decision, though much commented on, was held not to have decided any principle which could govern the points there in question.

In *Harrington v. Harrington* (*supra*), the third Earl of Harring-

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tion in 1804 had joined with his son (afterwards fourth Earl) in making a settlement of the family mansion-house and estates, in strict settlement in the usual way, and twenty years later made his will, whereby he gave personal chattels "in trust for the person or persons who, for the time being, shall under or by virtue of, or under the limitations contained in any settlement of my [mansion-house and estates], be in the actual possession of the same mansion-house and estates, to the end and intent that all and singular such [chattels] may be deemed and considered as heirlooms, to go along and forever be used and enjoyed with the same mansion-house and estates, so far as the rules of law or equity will permit, but so, nevertheless, as that the same chattels personal shall not, as to the effect or purposes of transmission, vest absolutely in any person who, under and by virtue of any settlement, shall or may become seized of, or entitled to, the said mansion-house and estates for an estate of inheritance, either in possession or reversion, or otherwise, unless such person shall attain the age of twenty-one years, or, dying under that age, shall leave issue inheritable under the limitations in any settlement thereof." The residuary personal estate was given to the trustees to convert into money, to be invested in the purchase of other real estates to be settled in the same way as the family mansion-house and estates above mentioned.

The third Earl died in 1829, and was succeeded by a son, who became fourth Earl, and dying without male issue in 1851, was succeeded by the third son of the third Earl (whose second son had in the meantime died without issue) as fifth Earl. He died in 1862, and was succeeded by his only son, the sixth Earl, who died in February, 1866, a minor. On the death of the sixth Earl, the respondent, a descendant of a younger son (named in the settlement) of the third Earl succeeded as seventh Earl to the earldom, and likewise became (as each Earl had been successively) tenant in possession of the family estates under the settlement. The respondent eventually disentailed the estates.

The appellant, who was the mother and administratrix of the sixth Earl, filed her bill claiming the chattels, on the ground that they had vested absolutely in the sixth Earl as having become entitled to the first estate of inheritance after the life estates, and that the proviso for defeating the interest of the sixth Earl by reason of his not having attained twenty-one, was void. The respondent, on the other hand, claimed possession of the chattels (1) as having been carried over by the proviso to him as the person in possession of the entailed estates under the settlement, and became absolutely vested in him by reason of the proviso having been exhausted; or (2), by reason that the chattels

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were not well disposed of by the specific gift in the will and were carried by the residuary gift to him as tenant in tail of the estates to be purchased, and as he eventually became absolute owner under the disentailing assurance.

The decree, which was immediately under appeal before the House of Lords, declared that on the death of the sixth Earl the chattels became subject to the trusts of the residuary personal estate under which the seventh Earl would be tenant in tail male of the lands directed to be purchased, and that having barred the entail in such lands and personal estate he had acquired the absolute interest.

The judgment of the House was to the effect that the respondent was entitled on one or other of the above grounds. Lord HATHERLEY, L. C., after observing that the will in *Christie v. Gosling* (*supra*) was of a different character, and that the decision there was not applicable, said (L. R. 5 H. L. 98-101): "We have to ascertain what is the intent of the instrument as now expressed, namely, that these chattels are to go to the persons taking for the time being under the limitation of the settlement, but so as that the property shall not vest in any person so taking if that person does not attain the specified age, or fulfil the specified condition. I apprehend, as Lord ST. LEONARDS said in *Christie v. Gosling* (L. R. 1 H. L. 279, 295) (where he differed from the rest of the noble and learned Lords who decided that case as to the construction of the will generally), that there could be no doubt whatever that the condition was annexed to the gift. It was not annexed by way of proviso, cutting down the gift, but was an essential part of the gift itself, so that no person could claim the gift except as a gift to him in the event of his being the person who ultimately could claim to hold the gift by fulfilling all the qualifications to which the gift itself was attached. I apprehend, therefore, that a person who took the estate, and did not attain the age of twenty-one, had not fulfilled the conditions of the gift, and cannot claim in any way to retain the gift: nor can any persons who derive their title through him make out any claim to that gift, as being a gift absolutely vested in him, subject only to be defeated by the proviso. I take it, therefore, that the claim of the appellant entirely fails; and the only question that remains is this, whether this proviso has the effect of carrying that estate on to those who come next in remainder — so exposing itself, as it was contended by the appellant, to be rendered void as aiming at perpetuity, in which event the farther carrying on of the estate would be contrary to the rules of law, and there would be a simple intestacy; or whether it does carry it on to the person next in remainder, subject to the controlling effect of those words, which are also to be found in this will, that the property is to go as an heirloom

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with the estate so long as the rules of law or equity will permit. Now, my Lords, a great deal of argument was employed before us upon the effect of those words, and as to how far those words could or could not control the effect of a limitation which might seem otherwise to err against the rule with respect to perpetuity, — how far, in other words, the Court would apply those words, so as to give to the limitations an effect consonant with the rule of law, and arrest and defeat the rule of defeasance by keeping the limitations within the limits which the law would allow. If this rule could be construed in that way, then the respondent, the seventh Earl, would be entitled, by virtue of having fulfilled all the conditions, as a person actually in existence within the prescribed limits, namely, a life in being and twenty-one years after the death of the testator, to claim the property absolutely given to him by the will in that character. In the other event there would be an intestacy, and the property would fall into the residuary gift*. Now, it so happens in this case that in either event the seventh Earl is clearly entitled to the property. If it falls into the residue, then he takes it as such by virtue of his being the last residuary legatee. If it goes over in the manner I have referred to, then he takes it by virtue of the limitation, he being himself the person standing within the prescribed limits. The difficulty upon that part of the case is simply this, that you cannot look on a bequest of this kind as an executory bequest, and take upon yourself to model the gift so as, by virtue of a modelling of the will, to give it full effect and validity. You cannot model it, but you must deal with it as you find it existing in the will. And the question is, whether these words, ‘so far as the rules of law or equity will permit,’ by themselves, by virtue of the phraseology of the limitation, imply that the will is to be read as if the testator had used that as a short expression to indicate the exact period to which he wished to confine the limitation, namely, to confine it to vesting within the ordinary prescribed limits. Upon that question there has been at times some conflict of opinion as to how far these words in themselves are words which will enable you to interpret the will in a sense such as to give to the whole operation of the bequest the effect which no one can doubt would be the purport and meaning of the testator in his will. I am not aware that there is upon this point any series of decided authorities of a contrary character, but I am aware that there has been some difference of opinion upon the subject: and it appears to me that in this particular case, in which we are called upon to lay down a rule of construction which will have effect not only upon this will, but upon other wills also, not only for the future (with respect to which, I think, we should adopt a rule of construction which would be very useful), but also wills which are past, or which

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are now in existence, and which are not before us for present consideration, I think it would, on the whole, be more prudent not to do more than the necessity of this case requires, namely, to vary the decree of the Court below so as to express that which is the fact, that, under all the circumstances of this case, the appellant being clearly entitled to no interest in these chattels, and the respondent being clearly entitled to them under either the one title or the other, we ought so far to modify the decree as to show that it is simply on that account that we affirm the judgment in favour of the respondent. We do so without making any farther or other declaration than that of the want of the title on the part of the appellant, and the absolute and complete title on the part of the respondent in one way or the other. The appellant has, in fact, completely failed in making any substantial case before your Lordships. The order made by your Lordships should express that the variation which I have referred to should be made in the original decree, and there should be no costs of this appeal, the necessity for which, and for the whole litigation in this matter, having been occasioned by the somewhat obscure and imperfect expressions contained in the will."

LORD WESTBURY, after observing that it had been settled (in the course of the argument) that the words of the gift of the heirlooms did not create an *executory trust*, — in the sense of a trust or direction to settle leaving the form of the settlement to be moulded by the trustees, — proceeded as follows: "The words are words of direct and complete gift, and the gift consists in the direction that the possession and enjoyment of the personal chattels shall accompany the settled real estates through all the changes of ownership that may occur during the time allowed by law for postponing the absolute vesting of personal property; that is, during a life or lives in being at the time of the gift and for twenty-one years afterwards. The words therefore amount to a declaration by implication of such trusts of the personalty as correspond with the ownership of the real estate, and secure its being held and transmitted with the real estate up to the limit of time allowed by law against perpetuities. In the construction of gifts of this nature it has been settled that when, and so soon as, the principal trust estates, to which the personal chattels are thus made accessory, vest in a tenant in tail in possession, the transmissibility of the personal estate ceases, although the time allowed by the Rule against Perpetuities has not expired, and the personal chattels become the absolute property of such tenant in tail in possession, although he may be an infant, and may afterwards die without having attained majority. On such an event the ownership of the personal chattels would be disjoined and severed from the settled real estates;

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and the effect of the direction that they should accompany the estates during all the time allowed by the Rule against Perpetuity would be *pro tanto* defeated. To meet this difficulty it has been usual to annex to the direction that the heirlooms shall go along with the settled real estates, a condition that the heirlooms shall not vest absolutely in any tenant in tail unless such tenant in tail shall attain the age of twenty-one years, or, dying under that age, shall leave issue inheritable under the settlement. Such a proviso occurs in the present will; and the event having happened of the death of the tenant in tail under twenty-one, who at the time of his death was tenant in tail in possession of the settled estates, and as such entitled to the enjoyment of the heirlooms, the question arises, whether such heirlooms are transmitted on to the next succeeding tenant in tail, or belong to the personal representative of the infant tenant in tail so dying, or are undisposed of, and fall into the residue of the testator's personal estate."

LORD COLONSAY agreed with the opinion of the LORD CHANCELLOR.

LORD CLAIRNS considered that the words of the will introduced by the expression "but so nevertheless" created a clause of defeasance, and must be taken as cutting down what would otherwise be the wider effect of the dispositive clause. If the words "so far as the rules of law and equity will permit" had been omitted in the earlier clause, it would have been difficult to avoid applying the principles of *Lord Dungannon v. Smith (supra)*; but the result would have been that the chattels would have fallen into the residue, and have gone to the respondent. And if, notwithstanding these words, "so far as the rules of law and equity would permit," the bequest were to be read as a trust for every person in succession to whom the estates might open, with a prohibition against vesting unless some tenant in tail attained twenty-one, so that the trust was destined to continue until some tenant did attain twenty-one, the bequest would have been equally void.

"The appellant," he continued, "seeks to avoid this construction by insisting that under the dispositive clause there was a trust for the sixth Earl of Harrington, who was in possession of the estates, and was the first tenant in tail to whom the possession accrued; and farther, that the clause of modification or defeasance is a clause applying to all tenants in tail *in perpetuum*, and being wholly invalid, cannot operate as against the sixth Earl dying under twenty-one. I will assume, for a moment, such a construction to be possible, on the words of this bequest, as I have stated it. But the construction would be arrived at only by splitting up the general words of the dispositive clause, and treating it as a trust for each person named in the settlement, if he come into possession; that is to say, for A. (tenant for life), if he come into possession, remainder for B. (tenant in tail),

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if he come into possession, and so on. But if the cumulative words of the dispositive clause can thus be divided, and effect given to one part, though not to other parts of the disposition, I cannot see why the appellant would not have, on the same principle, to submit to a similar treatment of the clause of defeasance, which would then be read as a clause applying itself to the estate of each person coming into possession and taking under the dispositive clause, and valid therefore as to some estates, though invalid as to others. But I am of opinion that there is no sound principle on which the generality of the trust, 'for the persons who shall for the time being be in the actual possession of the estates' can be explained and limited, except by the limit to be derived from the words which I have hitherto purposely omitted, 'to the end and intent that the [chattels] may be considered as heirlooms, to go along and forever be used and enjoyed with the same mansion-house and estates, so far as the rules of law and equity will permit.' Lord HARDWICKE was of opinion, in the cases of *Gower v. Grosvenor* (5 Madd. 337) and *Trafford v. Trafford* (3 Atk. 347) that words of this kind made a trust of chattels an executory trust and not a direct gift; and that a Court of equity might execute the trust according to the general intent of the testator, and, even without any direction to that effect, carry over the chattels, within certain limits, on a tenant in tail dying under twenty-one. These decisions are commented on, and the subsequent decisions to the contrary collected, by Lord COTTENHAM in *Rowland v. Morgan* (2 Ph. 764), who regretted, as many others have done, that Lord HARDWICKE's views had not been followed. None, however, of the authorities opposed to Lord HARDWICKE's opinion has doubted, indeed all have assumed, that a general trust of chattels to go with settled estates, or to be held by persons for the time being entitled to the possession of settled estates, as long as the rules of law and equity would permit, would be effectual, and effectual by reason of those particular words, to carry the chattels to the first person with an estate of inheritance. And the doctrine of the same authorities, that the Court of equity could not farther protect the chattels if that person died under twenty-one, would of course be irrelevant to the present case, if there is here a valid gift over on death under twenty-one.

I come then, without hesitation, to the conclusion that what I have termed the dispositive clause in the will of Charles Earl of Harrington, carries the chattels as heirlooms to the sixth Earl; but I am also of opinion that the clause of defeasance prevented the chattels vesting in the sixth Earl, dying as he did under twenty-one. I give to the second clause the effect of making it operative on the disposition which

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is validly created by the first clause, an operation consonant to the introductory words of the second clause, viz., ‘But so nevertheless.’ Whether this is the whole operation of the two clauses, or whether the combined effect of the two clauses is to carry over the chattels to the present Earl as next in possession, is immaterial either to the respondent or appellant; and now that the whole title of the respondent has been stated on the record, it may, perhaps, be sufficient and more expedient to declare that, in the events which have happened, the present Earl is entitled to the chattels. If it were necessary, however, to decide under what title the respondent takes the chattels, I should probably prefer the title declared by the decree as it stands. But I think it, at the same time, a legitimate construction to read the clause of defeasance as inserted in the dispositive clause before the words, ‘to the end, &c.,’ thus:

“I give my chattels in trust for the persons for the time being in actual possession of the estates:

“So that, nevertheless, they shall not vest in any one entitled to the estates for an estate of inheritance unless he attain twenty-one, &c.”

“To the end that the chattels may be heirlooms and go with the estates, so far as the rules of law and equity will permit.

“This would be simply marshalling the clauses of the sentence in their logical sequence, and would divest and carry over the chattels within legal limits.

“I think that in every view of the case the appellant fails, and that the appeal must be dismissed.”

It was accordingly ordered by the House that the appeal be dismissed. “And it appearing to this House that, in the events which have happened, and having regard to the title of the plaintiff, Charles Wyndham, seventh Earl of Harrington, as tenant in tail male in the actual possession of the mansion-house and estates at Elvaston, in the county of Derby, settled by the indenture of the 20th of July, 1804, and also as absolutely entitled to the residuary estate of Charles, third Earl of Harrington, it is unnecessary to decide under which title the plaintiff, Charles Wyndham, seventh Earl of Harrington, has become entitled to the heirlooms and funds in the decree mentioned:” it was further ordered that the decree of the Court of Chancery be varied; and by the decree as varied it should be adjudged and declared, that in consequence of the death, under twenty-one, of the sixth Earl of Harrington, the plaintiff, the seventh Earl, had become and was absolutely entitled to the chattels in question with consequential directions.

Lords Journals, 27th March, 1871.

AMERICAN NOTES.

Mr. John C. Gray's book on the Rule against Perpetuities has done very much, since its publication in 1886, to lessen the labors of the American lawyer in dealing with the difficult subjects of which it treats. The author's investigation of all questions relating to the rule has been thorough and scholarly, and the result is a work of great value upon a topic that certainly needs elucidation. As Mr. Gray says in his preface, "There is something in the subject which seems to facilitate error. Perhaps it is because the mode of reasoning is unlike that with which lawyers are most familiar. The study and practice of the Rule against Perpetuities is indeed a constant school of modesty. A long list might be formed of the demonstrable blunders with regard to its questions made by eminent men, blunders which they themselves have been sometimes the first to acknowledge; and there are few lawyers of any practice in drawing wills and settlements who have not at some time either fallen into the net which the rule spreads for the unwary, or have not at least shuddered to think how narrowly they have escaped it."

Mr. Gray, in sect. 201 of his book, states the rule as follows: "No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." Apart from statutory modifications, the rule seems always to have been adopted in America in its modern English form, and the leading principles which have been laid down by the English Courts have been followed in this country.

Thus it is well settled in America that vested interests are not subject to the rule, however remote may be the time when they are to come into possession. For example, in *Seaver v. Fitzgerald*, 141 Massachusetts, 401, a testator bequeathed property to his executors in trust to use so much of the income as should be needed for the support of his daughter during her life, and of her child or children during the life of each and all; and directed that "the balance of said income and the property after the death of my said child, and her child or children, if any, shall all be paid over by my executors for the sole use and benefit of the Augustinian Society of Lawrence, . . . to said corporation forever." The Court held that the devise over to the corporation was not too remote. "The estate or interest vested in the Augustinian Society, a body corporate, absolutely and at once, upon the testator's death, subject to the preceding life estates. All that is required by the Rule against Perpetuities is that the estate or interest shall vest within the prescribed period. The right of possession may be postponed longer."

So in case of a resulting trust to the heirs of the grantor, upon the failure of an express trust declared in the deed. *Hopkins v. Grimshaw*, 165 United States, 342.

See also *Pulitzer v. Livingston*, 89 Maine, 359; *In re Johnston's Estate*, 185 Pennsylvania State, 179; Gray, Rule against Perpetuities, sects. 205, 206, 209.

In sect. 210, Mr. Gray points out an opportunity for abuse which this principle affords. "There can be no remainder after a fee simple; a remainder after a fee tail is destructible; a remainder after life estates vests in posses-

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sion at the end of life interests which must begin within the limits of the Rule against Perpetuities; but a remainder after a term for years may not come into possession for centuries. Here there seems an opportunity for abuse. If an estate is devised to A. and his heirs, but if he or they ever change their family name, then to B. and his heirs, the gift to B. is an executory devise, and is too remote. But suppose an estate is devised to A. for a thousand years, unless A. and his heirs sooner change their name, and, subject to the term, the land is devised to B., here B. has an interest theoretically vested, but practically contingent upon A. and his heirs changing their name, — an event which may be very remote. The trouble arises from terms being sometimes of extravagant length. Some legislation, like that of Alabama, which provides that 'no leasehold can be created for a longer term than twenty years,' would seem judicious."

In America, as in England, it is well established that the contingency upon which the vesting of a future estate depends must be one which is sure to happen, if at all, within the required limits, and not merely one that may happen, or even one that will probably happen, within those limits.

Thus, in *Sears v. Russell*, 8 Gray (Mass.), 86, there was a gift over upon the death of any child of the testator's daughter after the death of its mother, but before the death of its father. The Court held the gift too remote, inasmuch as the testator's daughter might possibly marry a man not born at the testator's death. On pp. 98-99, BIGELOW, J., speaking for the Court, said: "If, in the present case, the devise had been to the daughter for life, and on her death to her children in fee, but if the children or either of them should die without issue, in the lifetime of any husband of the daughter, living at the testator's death, then to the heirs of the testator, it would not have been liable to the objection of remoteness; because it would be limited over on an event which must occur within the allowed period, to wit, a life in being at the testator's death. But although, at the time of the death of the testator, his daughter had a husband living, his subsequent decease was neither impossible nor improbable. In the event of his death, she might have contracted a second marriage and had issue by a husband who was not born at the time of the death of the testator. Such an event was certainly improbable, but it was not impossible, and so the devise over might by possibility not have taken effect during a life in being at the testator's death, and more than twenty-one years thereafter. It was therefore void for remoteness."

See also *Stephens v. Evans*, 30 Indiana, 39; *Coggins' Appeal*, 124 Pennsylvania State, 10; Gray, Rule against Perpetuities, sect. 214.

And it is not material that, as events have turned out, the period of the rule is not exceeded. Thus, in *Perry on Trusts*, 5th ed. sect. 381, it is said: "It will be observed, that, in determining whether a particular devise is contrary to the Rule against Perpetuities, the inquiry is not whether the contingency upon which the estate is to vest actually occurs within the time limited by the rule, but whether it is possible that the event may not happen within the time. If it is possible that the event upon which an executory devise or shifting or springing use is to vest in some person may not happen within the time, the executory estate is void, although in fact the event actually happens within the time."

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And in *Coggins' Appeal*, 124 Pennsylvania State, 10, 18-19, PENROSE, J., said: "If the case rested upon the will alone, and if the gift to the grandchildren of the testator must be understood as including all who shall attain the age of twenty-five years at any time, it would necessarily follow that the limitation would be void as transgressive of the Rule against Perpetuities, notwithstanding the fact that no grandchild has been born since his death. The validity of such a gift is to be tested by possibilities, not by actual results. Unless the limitation be such that it must, inevitably, vest within a life or lives in being and twenty-one years, &c., after the death of the testator, it fails in its inception and is bad altogether."

With regard to the number of lives which may be taken, there is, in America, as in England, no limit, except where the Legislature has seen fit to establish one. See *Madison v. Larmon*, 170 Illinois, 65; *Hills v. Simonds*, 125 Massachusetts, 536; *Gray*, Rule against Perpetuities, sects. 216-218.

The term of twenty-one years seems to have been always recognized in the United States. As early as 1813, Judge Story held that period to be the limit of the Rule against Perpetuities (*Barnitz v. Casey*, 7 Cranch (U. S.), 456, 469). And in 1800 we find the same doctrine stated as law in the argument of counsel in *Pleasants v. Pleasants*, 2 Call (Va.), 319, 331.

Of course the question of remoteness, arising under a will, is to be determined by reference to the time of the testator's death, when the will goes into effect, and not by reference to the date of the will. *Madison v. Larmon*, 170 Illinois, 65; *Hosea v. Jacobs*, 98 Massachusetts, 65, 67. "As the law should not take a wanton pleasure in thwarting the intention of a testator, it seems strange that it could ever have been supposed that the question of remoteness was to be determined by the state of things at the date of a testator's will, and not at the time of his death. The object of the Rule against Perpetuities is to confine the vesting of contingent estates to a short period after their creation; and if it is certain when the estate is created that the contingent event must happen within the required time, it seems a needless interference with the testamentary power to say that the estate is bad, because, at some time, before the estate was created, and when its existence was entirely in the control of the testator, it was not certain that the contingent event would happen within the required time. For example, land is devised to those children of A. who reach twenty-five. If the testator die before A., the gift is too remote, because A. may have a child born after the testator; but if A. die before the testator, there can be no objection to the devise, because it must take effect, if at all, in the lives of A.'s children, and none of these can be born after the testator's death. Mr. Lewis in the supplement to his treatise proves super-abundantly that the time of the testator's death is the true period at which to judge of the remoteness of the provisions in his will. The rule that the question of remoteness is to be determined from the time of the testator's death, and not of his will, is now settled." *Gray*, Rule against Perpetuities, sect. 231.

It is settled in most American states, in accordance with the English law, and clearly in harmony with principle, that an interest which vests within the required time is not too remote, though it may end beyond those limits.

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Madison v. Larmon, 170 Illinois, 65; *Pulitzer v. Livingston*, 89 Maine, 359. *Loring v. Worthington*, 106 Massachusetts, 86; *In re Johnston's Estate*, 185 Pennsylvania State, 179.

In *Madison v. Larmon*, *supra*, and *Loring v. Worthington*, *supra*, it was held that a life estate to an unborn person, which would vest within the necessary limits, was good. In *Johnston's Estate*, *supra*, it was held that an estate for years, beginning within the required time, was good, though its termination might be beyond. *Pulitzer v. Livingston*, *supra*, overruled the peculiar case of *Slade v. Patten*, 68 Maine, 380, in which it had been held that a devise to trustees, in trust for certain living persons and their heirs, was void as creating a perpetuity.

In other American cases besides *Slade v. Patten*, however, it has been held, clearly wrongly, that interests beginning within the limits of the Rule against Perpetuities were still too remote. *Barnum v. Barnum*, 26 Maryland, 119, for example, is to the same effect as *Slade v. Patten*. And in *Deford v. Deford*, 36 Maryland, 168; *Smith's Appeal*, 88 Pennsylvania State, 492; and other cases commented on in Gray, Rule against Perpetuities, sects. 238 *et seq.*, life interests beginning within lives in being have been held too remote. *Smith's Appeal*, however, was doubted in *Coggins' Appeal*, 124 Pennsylvania State, 10, and partially overruled in *Lawrence's Estate*, 136 Pennsylvania State, 351. See also *Owens' Petition*, 3 Pennsylvania Dist. Rep. 328.

Where a future interest in a deed or will is invalid under the rule, the American cases are clear to the effect that the prior interests become what they would have been if the clause or clauses providing for the future interest had been omitted from the instrument. If a fee simple is granted or devised, subject to a remote executory devise, the grantee or devisee takes an absolute fee. A leading case on this point is *Brattle Square Church v. Grant*, 3 Gray (Mass.), 142. There land was devised to the deacons of a church and their successors forever "upon this express condition and limitation, that is to say, that the minister or eldest minister of said church shall constantly reside and dwell in said house, during such time as he is minister of said church; and in case the same is not improved for this use only, I then declare this bequest to be void and of no force, and order that said house and land then revert to my estate, and I give the same to my nephew, John Hancock, Esquire, and to his heirs forever." The Court held that the devise over to Hancock was too remote, and that the deacons and their successors took an absolute estate in fee.

So, "if the devise of a future interest is void for remoteness, but the prior devise is for life only or other limited period,—for instance, if there be a devise to an unborn child for life, remainder to the unborn child of such unborn child,—the property after the termination of the prior interest goes to the person to whom property which has been invalidly devised or bequeathed goes. This person is generally the heir in case of realty, and the residuary legatee in case of personality. There is no difference in this respect between a devise or bequest void for remoteness, and a devise or bequest void for any other reason." Gray, Rule against Perpetuities, sect. 248; citing *Tongue v. Nutwell*, 13 Maryland, 415; *Deford v. Deford*, 36 Maryland, 168. But see *Caldwell v. Willis*, 57 Mississippi, 555.

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Questions of the conflict of laws arise where statutory changes have made the Rule against Perpetuities differ in different jurisdictions. The validity of a disposition of land is to be determined by the law of the state where the land lies. *Knox v. Jones*, 47 New York, 389; *Ford v. Ford*, 70 Wisconsin, 19. The remoteness of a bequest of personalty is ordinarily dependent upon the law of the testator's domicile. *Whitney v. Dodge*, 105 California, 192; *Knorr v. Jones*, *supra*, *Cross v. United States Trust Co.*, 131 New York, 330. But where the personalty is to be taken to another state and there invested on certain trusts, it has been held to be sufficient if the law of that state sanctions the trusts, though they are invalid by the law of the testator's domicile. See *Chamberlain v. Chamberlain*, 43 New York, 424, 434; *Hope v. Brewer*, 136 New York, 126; *Kurzman v. Lowry*, 52 New York Supplement, 83. In the last-named case, at p. 85, the Court said: "It is the policy of this state to allow testators free power to provide for the disposition of personalty, which is to be taken to a foreign country, in accordance with the laws of that country. Such property as shall remain within the state of New York must be subject to the laws against perpetuities and forbidden trusts, for the laws of this state in that respect are designed to operate upon all the property within its limits. They are founded upon public policy, which provides for proper power of disposition of property from person to person, without undue curtailment of the right in some one, within reasonable periods, to pass the title. But the object of the law is satisfied if the property is to be removed from the jurisdiction of the state. It leaves the Courts of that other state the power to guide and control the execution of the trusts and the fulfilment of the wishes of the testator."

Gifts to classes of persons give rise to some of the most interesting and important questions in the law of perpetuities. It is of course clear that a gift to a class is void if the class will not be determined within the required limits. Gray, Rule against Perpetuities, sects. 369-388. But "when gifts are made to several persons by one description, but the amount of the gift to one is not affected by the existence or non-existence of the others, then the gifts are separable. Thus if the testator gives £1500 to each one of X's children who reaches twenty-five, each child born before the testator's death upon reaching twenty-five will take the legacy, although those born after will not." Gray, sect. 389. See *Hills v. Simonds*, 125 Massachusetts, 536; *Dorr v. Lovering*, 147 Massachusetts, 530; *Lowry v. Muldrow*, 8 Richardson's Eq. (S. Car.) 241.

In *Hills v. Simonds*, *supra*, a testator devised property to trustees, in trust to pay the income to his son for life, and, on his death without issue, to be divided among his nephews and nieces, the children of certain brothers and sisters, during their natural lives, "and after their decease to be equally divided among their children or their legal representatives." The son died without issue, and no nephews or nieces were born after the testator's death. The Court held that such a nephew or niece born after the testator's death would have been entitled to share with the nephews and nieces then living; that the limitation over to the children or legal representatives of the nephews and nieces living at the testator's death was not void for remoteness; and

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that the possible partial invalidity of the devise in case of the children or legal representatives of any after-born nephew or niece would not defeat the devises to the children or legal representatives of the living nephews and nieces. "It is the same, in effect," the Court say, "as if the testator had made separate devises to each nephew and niece living at his death, with a limitation over to their respective children or legal representatives, and also a devise to any nephew or niece who might be born after his death and before the death of George, with a like limitation over. The latter limitation over would be void for remoteness, but this would not defeat the devises to the nephews and nieces living at the death of the testator and to their children or legal representatives."

This principle was overlooked in *Sears v. Russell*, 8 Gray (Mass.), 86; *Loring v. Loring*, 129 Massachusetts, 97; and *Smith's Appeal*, 88 Pennsylvania State, 492. But *Dorr v. Loring*, 147 Massachusetts, 530, establishes the law on a correct basis for Massachusetts.

Loring v. Loring, *supra*, is an excellent illustration of the "net which the rule spreads for the unwary." In that case a testator devised land to trustees in trust to pay the income to his daughter Nancy during her life, and upon her decease to her children during their lives. "And as the children of said Nancy shall successively decease," the land to be conveyed, or its proceeds paid "to and among the heirs-at-law of all the children of said Nancy, that is to say, that as said Nancy's children shall successively decease, a proportion of said estate, or the proceeds, are to be conveyed, or distributed to and among the respective heirs-at-law of each child so deceasing, said Nancy's grandchildren to take in right of representation of their deceased parents." The Court said: "It is conceded that if the devise to" Nancy "would include children born after the death of the testator, the limitation over to the heirs of such children is void for remoteness." It was held, rightly, that the devise did include after-born children. But the concession referred to by the Court should not have been made. "The gifts to the heirs of Nancy's children were not too remote. The shares must have been determined at her death. The heirs of each child took her share, and only her share. Nothing after the death of Nancy in any way affected the amount of any share. The question of remoteness was to be considered with regard to each share separately. And as the children of Nancy were all alive at the testator's death, their heirs were entitled to their shares. But the rights of the heirs were 'conceded' away." Gray, Rule against Perpetuities, sect. 394.

In *Dorr v. Loring*, *supra*, where the same will was again before the Court, it was decided that the concession of counsel in *Loring v. Loring* should not have been made, and that the limitation over to the heirs-at-law of such children as were living at the death of the testator was not void for remoteness.

Much confusion has arisen, especially in America, in the discussion of the Rule against Perpetuities, from the erroneous notion that the rule is aimed, not against the creation of future interests, vesting at a remote time, but against restraints on the alienation of present interests. Mr. Gray does much in his book to remove this source of confusion. In Chapter VII. he

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shows clearly that interests, though alienable, may be too remote. But the other notion is very popular, and Courts have often held that, where the capacity to alienate exists, the rule does not apply. See 49 American State Rep. 121. And the effect of this notion is clearly seen in many of the statutes which American Legislatures have enacted on the subject of perpetuities.

Statutory enactments on this subject have been common in the United States, and in some states, as in New York, have worked radical changes in the common law.

A few of the state constitutions contain simple provisions to the effect that perpetuities and monopolies are contrary to the genius of a free state, and should not be allowed. See Arkansas, Constitution of 1874, art. 2, sect. 19; North Carolina, Constitution of 1876, art. 1, sect. 31; Tennessee, Constitution of 1870, art. 1, sect. 22; Texas, Constitution of 1876, art. 1, sect. 26. See also New Mexico, Compiled Laws (1884), sect. 2600.

In other states there are short statutes, doubtless intended to be declaratory of the common law. Such statutes are Georgia, Code (1895), sect. 2102; Iowa, Code (1897), sect. 2901; Kentucky, Statutes (1899), sect. 2360. The Kentucky statute is as follows: "The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of a life or lives in being at the creation of the estate, and twenty-one years and ten months thereafter."

In other states there are short statutes modifying the common law. See Alabama, Code (1897), sect. 1030; Connecticut, General Statutes (1888), sect. 2952; Indiana, Statutes, Revision of 1891, sects. 3382, 3383; Ohio, Revised Statutes (1890), sect. 4200. The Connecticut statute provides that "no estate in fee simple, fee tail, or any less estate, shall be given, by deed or will, to any persons but such as are at the time of the delivery of such deed, or death of the testator, in being, or to their immediate issue or descendants."

In New York, and other states which have followed her example, an elaborate scheme has been substituted for the common law. The New York statute is contained in Revised Statutes, Part II. ch. 1, tit. 2, sects. 14-21, 23, 24, 36-40, and Part II. ch. 4, tit. 4. Its main provisions as to the remoteness of interests in land are as follows:

"Sect. 14. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this Article. Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed.

"Sect. 15. The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case mentioned in the next section.

"Sect. 16. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of twenty-one years, or upon any other contingency, by which the estate of such persons may be determined before they attain their full age.

"Sect. 17. Successive estates for life shall not be limited, unless to persons

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in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, and upon the death of those persons the remainder shall take effect, in the same manner as if no other life estates had been created.

"Sect. 18. No remainder shall be created upon an estate for the life of any other person or persons than the grantee or devisee of such estate, unless such remainder be in fee; nor shall a remainder be created upon such an estate in a term for years, unless it be for the whole residue of such term.

"Sect. 19. When a remainder shall be created upon any such life estate, and more than two persons shall be named, as the persons during whose lives the life estate shall continue, the remainder shall take effect upon the death of the two persons first named, in the same manner as if no other lives had been introduced.

"Sect. 20. A contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited, be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof.

"Sect. 21. No estate for life shall be limited as a remainder on a term of years, except to a person in being, at the creation of such estate."

The New York scheme also contains provisions as to the accumulation of rents and profits from land, and provisions as to the remoteness of interests in personal property, and as to the accumulation of income therefrom.

The New York system, except in its provisions relating to personal property, has been copied, with hardly an alteration, in Michigan, Compiled Laws (1897), ch. 237, sects. 14-21, 23, 24, 36-40; Minnesota, Statutes (1894), sects. 4375-4382, 4384, 4385, 4397-4401; Wisconsin, Statutes (1898), sects. 2038-2045, 2047, 2048, 2060-2064. The Wisconsin statute makes an exception in favor of devisees to literary or charitable corporations, organized under the laws of that state. Sect. 2039.

California has also copied largely from the New York statutes, but in that state the number of lives in being is not limited. California, Civil Code (1885), sects. 715-718, 722-726, 770-777. Provisions similar to those of California are contained in Idaho, Revised Statutes (1887), sects. 2836, 2851, 2852; South Dakota, Statutes (1899), sects. 3629-3631, 3655-3663.

The subject of legislative changes in the United States is treated in Appendix C of Mr. Gray's book.

PERSONAL CHATTELS.

(See "BILL OF SALE" (of personal chattels), 5 R. C. 1-139.)

The Colonial Bank v. Whinney, 11 App. Cas. 426. — Rule.

PERSONAL PROPERTY.

THE COLONIAL BANK v. WHINNEY.

(H. L. 1886.)

RULE.

RIGHTS in the nature of property and enforceable by action, other than rights in land or property in a thing capable of tangible possession, such as shares in a company constituted by a special Act incorporating the Companies Clauses Consolidation Act, 1845. — are “chattels personal” within the meaning of the reputed ownership clause of the Bankruptcy Act, 1883, and are within the class of personal property described as “choses (or things) in action” in the proviso of the same clause.

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11 App. Cas. 426-448 (s. c. 56 L. J. Ch. 43; 55 L. T. 362; 34 W. R. 705).

[426] *Bankruptcy. — Reputed Ownership. — Shares in Incorporated Company. — Deposit of Share Certificates. — Transfer of Shares. — Chose in Action. — Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 44, sub-sect. iii.*

Shares in an incorporated company transferable only by deed are “things in action” within the meaning of the proviso in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 44, sub-sect. iii.

A registered shareholder in an incorporated company deposited with his bank his share certificates, together with a blank transfer executed by himself as security for advances by the bank. Upon each certificate was a note that in the event of sale or transmission the certificate must be surrendered with the deed of transfer before the transfer could be registered or a new certificate issued. The Companies Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 17), to the provisions of which this company was subject, by sect. 12 enacts that the certificate should be *prima facie* evidence of title, but that the want of the certificate shall not prevent the holder of any share from disposing thereof; and by sect. 14 requires the transfer of any share to be by deed.

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The shareholder having become bankrupt before the company received any notice of the deposit :—

Held, reversing the decision of the Court of Appeal (30 Ch. D. 261), that having regard to the note upon the certificates, the shares were not in the possession, order, or disposition of the shareholder under such circumstances that he was the reputed owner thereof within the meaning of the Bankruptcy Act, 1883, sect. 44, sub-sect. iii.

Held, also, reversing the decision of the Court of Appeal, and agreeing with the dissentient judgment of FRY, L. J., that the shares were “things in action” within the meaning of the proviso in that sub-section.

Appeal from an order of the Court of Appeal. The facts material to this report are as follows :—

W. E. Blakeway and P. W. Thomas carried on business as stockbrokers in London under the firm of P. W. Thomas, Sons, & Co. In January, 1880, the firm bought 7018 £10 shares in the *Forth Bridge Railway Company, which were [*427] registered in the name of W. E. Blakeway and held by him for the firm. The Forth Bridge Railway Company was incorporated by a special Act of 1873, which incorporated the Companies Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 17). Each share certificate contained the following: “Note. — In the event of sale or transmission this certificate must be surrendered with the deed of transfer, whether the deed transmits all or any of the shares, before the transfer can be registered or a new certificate issued.” In April, 1880, Blakeway deposited with the appellants the certificates for his 7018 shares, together with a blank transfer executed by himself, as security for a balance due from the firm to the appellants. In January, 1884, Blakeway & Thomas became bankrupt, and the respondent was appointed trustee in bankruptcy. No notice of the deposit was given to the railway company till after the bankruptcy.

The appellants having brought an action against the respondent claiming a declaration that they were entitled to a valid charge on the shares for the balance due with interest, and to have the shares transferred into their names, and for consequential relief, BACON, V.-C., dismissed the action with costs, and this decision was affirmed by a majority of the Court of Appeal (COTTON and LINDLEY, L. JJ., against FRY, L. J.).

The dissentient judgment of FRY, L. J., which is referred to with approval by several of the Lords in the ultimate appeal, was as follows :—

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[30 Ch. D. 285] FRY, L.J. :—

One of the questions argued before us on the present appeal has been, whether the shares in question in this case are or are not choses in action, within the meaning of those words as used in the 3rd sub-section of the 44th section of the Bankruptcy Act, 1883.

The shares in question are shares in a company constituted by Act of Parliament which incorporates the Companies Clauses Consolidation Act, and that Act declares that shares are personal property, transmissible as such, and furthermore provides for the transfer of the shares by deed in a specified manner.

The first question is whether, according to the ordinary legal meaning of the words "things in action," which I take to be technical words, they include such shares as those in controversy. This leads to the consideration of some very elementary points in English law. According to my view of that law, all personal things are either in possession or in action. The law knows no *tertium quid* between the two. "No chattel," says Lord COKE, in *Fulwood's Case*, 4 Co. Rep. 65 a, "either in action or possession,

shall go in succession," as if the two alternatives were the [^ 286] only possible ones. * "Property in chattels personal,"

says Blackstone, "may be either in possession; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing; or else it is in action; where a man hath only a bare right, without any occupation or enjoyment" (Bl. Com. book 2, c. 25, p. 389), and so Lord HARDWICKE in the great case of *Ryall v. Rolfe*, 1 Atk. 165, 182, speaks of personal property, whether in possession or action only, as equivalent to all kinds of personal property. The expression "choses in suspense" is found in Brooke's Abridgement, in conjunction with choses in action; but, so far as I can understand, the two expressions are synonymous.

It has been suggested that the expression "choses in action" was originally only applicable to debts; and that by a lax usage it has acquired a secondary and wider significance. I am not able to adopt this view. The article "Choses in Action and Choses in Suspense," in Brooke's Abridgement (Fol. 140), seems to show that as early as 5 Edw. IV., the expression was held to include the King's right to the marriage of his ward; in 9 Hen. VI., the property in deeds in the hands of a third person was considered as

a chose in action; and in the 33 Hen. VIII., the classification of choses in action into real, personal, and mixed, was recognised. Indeed, the whole article appears to me inconsistent with the notion that according to early usage the expression was confined to debts. On the contrary, that early usage appears to me to have been as wide as the modern usage, as explained by Mr. Joshua Williams¹ in the passage which has been cited by Lord Justice COTTON.

What, then, is the character of a share in a company? Is it in its nature a chose in possession, or a chose in action? Such a share is, in my opinion, the right to receive certain benefits from a corporation, and to do certain acts as a member of that corporation; and if those benefits be withheld or those acts be obstructed, the only remedy of the owner of the share is by action. Of the share itself, in my view, there can be no occupation or enjoyment; though of the fruits arising from it there may be occupation, enjoyment, and manual possession. Such a share appears to me to be closely akin to a debt, which is one of the most familiar of choses in action; no action is required to obtain the right to the * money in the case of the debt or the right to the [*287] dividends or other accruing benefits in the case of the share; but an action is the only means of obtaining the money itself or the other benefits *in specie*, the right to which is called in one case a debt and in the other case a share. In the case alike of the debt and of the share, the owner of it has, to use the language of Blackstone, "a bare right without any occupation or enjoyment." A debt, no doubt, differs from a share in one respect, that it confers generally a more limited right than a share, and that when once paid it is at an end; but this distinction appears to me immaterial for the purpose now in hand.

It is true that unassignability by act *inter vivos* has been a character of many choses in action in the earlier stages of our law. But the question whether a personal thing is or is not assignable, is not, in my opinion, a criterion of whether it is in possession or in action. The King has always been able to assign choses in action that are certain. Bills of exchange have been assignable by our law ever since the law merchant on that point was recognised by our Courts hundreds of years ago; many choses in action have long been assignable by statute, such as promissory notes and bail and replevin bonds, and by the Judicature Act of 1873

¹ Williams on Personal Property (12th ed. p. 4).

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all debts and other legal choses in action were made assignable in the manner therein indicated. With great deference to those who think otherwise, I consider that the power of transfer conferred on the holder of these shares by statute does not affect the question.

Furthermore, on the question whether a particular property is a chose in action or not, I think it immaterial to inquire whether the right in question was formerly enforceable at law or in equity; a right of suit is equally a chose in action, whether the forum be legal or equitable.

Turning now to authority, I find that in the case of *Humble v. Mitchell* (1839), 11 Ad. & E. 205, the question arose whether shares in a joint stock company were goods, wares, or merchandise within the meaning of the 17th section of the Statute of Frauds; and in determining that they were not, Lord DENMAN observed that shares in a joint stock company like this are mere choses in action; and in this judgment Justices PATTESON, WILLIAMS, and COLERIDGE concurred. Again, *in *Ex parte Agra Bank* (1868), L. R. 3 Ch. 555, a question arose as to certain shares in the San Pedro Mining Company being in the order and disposition of the bankrupt Worcester. Though the precise constitution of the company is not stated, it appears that the company was an English one, by which certificates of shares were issued, and in which the shares passed by transfer; the case was argued and decided on the footing of these shares being choses in action, and they are so described in the judgment of Lord HATHERLEY, then Lord Justice PAGE WOOD. On the other hand, in the case of *Ex parte Union Bank of Manchester* (1871), L. R. 12 Eq. 354, Vice-Chancellor BACON held that shares in a company under 7 & 8 Vict. c. 110, were not choses in action within the meaning of the Bankruptcy Act, 1869, partly upon the ground that, if it had been intended to exclude from the operation of the Law of reputed ownership everything incapable of manual delivery, a clearer term would have been used, and partly on the ground that the owner's title depended on the register. And again, in *Société Générale de Paris v. Tramways Union Company*, 14 Q. B. D. 424-451, Lord Justice LINDLEY approved of the decision of the VICE-CHANCELLOR, and dwelt upon the fact that a transferee of shares has a legal and not merely an equitable right to become a shareholder.

In this conflict of authorities upon the precise point, it is not useless to consider the authorities bearing on personal things of a

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kind closely analogous to shares in a company. The right of a fund-holder in the public funds, where there is, of course, a legal power to assign, has long ago (1790, 1817) been held to be a chose in action. *Dundas v. Duttons*, 1 Ves. 196; *Rex v. Copper*, 5 Price, 217 (19 R. R. 568). In *Ex parte Ibbotson* (1878), 8 Ch. D. 519, the Court of Appeal held a policy of assurance to be beyond all argument a thing in action within the meaning of the clause in question; and in *In re Bainbridge*, 8 Ch. D. 218, Chief Judge BACON held that the share of a partner in the partnership property was a chose in action. If it be rightly decided, as I think it was, that a share in a partnership is a chose in action, it is very difficult to conclude that a share in a joint stock company is not * a chose in action. In the case of a part- [* 289] nership, the real and personal property of the partnership is, or may be, vested in all the partners, and each therefore may have a legal interest in choses in possession. In the case of a corporation, the whole property of the concern is vested in the corporation, and the individual corporators have no direct interest in the chattels in possession which may belong to the concern. In a partnership of seven persons, each would have a chose in action; if that partnership incorporated itself under the Companies Act, 1862, would each of the seven have a chose in possession?

Is there anything in the circumstances, or scope, or object, or context of the enactment in question, to show that the words "things in action" are there used in a more restricted meaning than their ordinary legal significance? The words were first introduced into the bankruptcy law by the Act of 1869, the year following the decision of the LORDS JUSTICES in *Ex parte Agre Bank*, and I cannot think that when the same words were repeated by the Legislature in 1883 they can be taken to have used technical legal words in a non-natural sense, because a learned Judge of the first instance had placed on the Act of 1869 an interpretation which for the purpose of this argument must be considered to have been erroneous. So far as I can gather, the object of the Legislature, both in 1869 and 1883, in excluding things in action from the operation of the law of reputed ownership, was to confine its operation to two classes of things, namely, those outward and visible things of which there may be a visible occupation and enjoyment, and those debts which are part of the property of every ordinary trader: and thus to simplify the law by excluding those

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delicate questions (especially relating to notice) which arise in respect of choses in action, and of which *Ryall v. Rolfe*, 1 Atk. 182, was one of the earliest, and *Ex parte Agra Bank* one of the then most recent illustrations. So far, therefore, as I can understand the object of the Legislature, it requires that the words shall receive their full legal import. I do not think that the assignability at law of the chose in action can have been a material consideration in the mind of the Legislature; for I see no relation

between that circumstance and the law of reputed ownership [*290] ship; and it is very *noteworthy that whilst in 1869, when this exception was first introduced, debts were not legally assignable, they had become assignable at law before the Act of 1883. If in the Act of 1883 things in action had been confined to things in action not assignable at law, the book debts of the trader could not have been inserted as an exception, for they were assignable at law at that date.

It was further argued that the 50th section of the Bankruptcy Act, 1883 (corresponding with the 22nd section of the Bankruptcy Act, 1869), shows that a limited construction ought to be placed on the words "things in action." The 3rd sub-section vests in the trustee a power to transfer shares or other property transferable in the books of any company, and the 5th sub-section provides that things in action of the bankrupt shall be deemed to have been duly assigned to the trustee. But the enactments are, I conceive, cumulative and not mutually exclusive, for by sects. 20 and 54 of the Act all the property of the bankrupt is vested in the trustee. But even if in sub-sect. 5 of the 50th section the words "things in action" ought to be read as things in action other than those mentioned in sub-sect. 3, it appears to me that this furnishes no clue to the proper construction of sect. 44. And I may observe that in the definition of the word "property" I find nothing to show that the words "things in action" are not used in their ordinary significance.

For these reasons I feel constrained to conclude that the shares in question are things in action, and that consequently they are not within the present law relative to reputed ownership. I have discussed what after all is a simple point, at a length which would be needless and pedantic were it not that I cannot differ from my brethren without hesitation and doubt, and that I wish to show that I do not differ without an attempt fully to consider the

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question on which I so dissent from their conclusion. My opinion is, for the reasons I have given, that the appeal should be allowed, but that opinion is under the circumstances inoperative.

After argument on the appeal to the House
of Lords:— [11 App. Cas. 432]

The House took time for consideration.

June 29. Lord BLACKBURN:—

My Lords, this is an appeal against an order of the Court of Appeal affirming a judgment of BACON, V.-C., dated the 28th of *July, 1884, and ordering that the plaintiffs, [*433] the Colonial Bank, do pay the costs.

The judgment of the 28th of July, so far as it is material, was as follows: "This Court, being of opinion that the plaintiffs are not entitled to the relief prayed by the statement of claim in this action, doth order that the action stand dismissed out of this Court, with costs to be paid by the plaintiffs."

The facts are not in dispute, and as far as material, in the view I take of the case, may be briefly stated. The firm of P. W. Thomas, Sons, & Co. consisted of two persons, W. E. Blakeway and Percy William Thomas. The firm bought and paid for 7018 £10 shares in the Forth Bridge Railway, a company incorporated by an Act of Parliament incorporating the Companies Clauses Consolidation (Scotland) Act, 8 Vict. c. 17. The name of W. E. Blakeway was entered in the register of shareholders as entitled to the 7018 shares, and certificates were delivered in his name, but the shares belonged to the firm.

The certificates of the shares (as to the form and legal effect of which I will say a word a little later) were deposited with the Colonial Bank as a security for advances made to the firm by that bank. They were accompanied by what is commonly called a blank transfer, signed and sealed by W. E. Blakeway. That was inoperative as a transfer. It was, however, I think, evidence that the deposit of the certificates was intended to be as a security. There was ample evidence independent of this to show that this was the real nature of the transaction, and that so long as the firm continued *sui juris* the Colonial Bank had a right to detain these certificates till the advances for which they were pledged were paid off; and it is not disputed now that, whilst the pledgors remained *sui juris*, the pledgee would be entitled to the relief

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which the Colonial Bank have prayed by the statement of claim in this action against the defendant. Some doubt which might seem to be thrown on this by *Ex parte Boulton*, 1 D. & J. 163, was removed by the decision in *Ex parte Stewart*, 4 D. J. & S. 543. But though this was so, the firm were still entitled to what, for want of a better term, I may (not quite accurately) call the equity of redemption in the shares. It was not contested [*434] that, as it has *turned out, the value of the shares was not sufficient to meet the unpaid advances, so that this property remaining in the firm has turned out not to be of any value; still it was their property.

Both partners became bankrupt in January, 1884, and the defendant was, on the 18th of February, 1884, appointed trustee under the bankruptcy.

Lord WESTBURY, in *Ex parte Stewart*, points out that the general rule in bankruptcy was that the assignee took the property of a bankrupt subject to the equities which affected it in his hands, and consequently that the only question under the bankruptcy law then in force, 12 & 13 Vict. c. 106, was whether the case was brought within 12 & 13 Vict. c. 106, s. 125.

The only question in the present case is whether the case is brought within sub-sect. iii. of sect. 44 of the Bankruptcy Act, 1883, which comprises, amongst the property of the bankrupt divisible among his creditors, "all goods" (a word which by the interpretation clause, sect. 168, in this Act, "unless the context otherwise requires," includes "all chattels personal") "being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof; provided that things in action, other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section."

There can, I think, be no doubt that shares in a railway company, though not goods in the ordinary sense of the word, are personal chattels, and I think as little doubt that the Colonial Bank were the true owners of the equitable right which they had acquired in the shares: but for the proviso, therefore, I think the chief question would have been whether this equitable interest was in the possession, order, or disposition of the bankrupts, who

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were the pledgors and true owners of the equity of redemption, by the consent and permission of the Colonial Bank under such circumstances that they, the bankrupts, were the reputed owners of the equitable interest. A further point was made, founded on the words "in his trade or business." I fear I did not quite * appreciate the argument, and as the words, which [* 435] are new, may be important in other cases, I prefer to consider the case as if those words were not here.

I think that the owner of chattels personal not passing by delivery, though he can create a good equitable title in a pledgee for the purpose of securing a debt, may still continue to be reputed owner of the whole property. It was argued that there was an inexorable rule that he must so continue, unless the persons to whom any one who took a subsequent conveyance from the person once the owner of the property would have to apply in order to perfect that title, had knowledge of the pledge. I think that such knowledge in them is one way in which it may be shown that the pledgor is not to be considered as reputed owner. If the decisions were confined to cases of notice, that is, notice given to those persons by the pledgee, as distinguished from mere knowledge acquired by them otherwise, it might be said that the cases only showed that the pledgee having given that notice, and done all that was in his power to make the pledge known, could not be said to consent to the apparent ownership. But *Ex parte Richardson*, Mont. & Ch. 43, *Ex parte Stewart*, 4 D. J. & S. 543, and *Ex parte Agra Bank*, L. R. 3 Ch. 555, all show that knowledge in those persons, though not derived from the pledgee, is a sufficient circumstance to prevent reputed ownership; I do not think there is either authority or principle for saying it is the only circumstance that can have that effect.

Lord HARDWICKE, who thought that the statute only applied where the bankrupt had been originally owner, says, in *Ryall v. Rolle*, 1 Ves. Sen. 348, 371, "It appears that the general view and intent of the provision now under consideration was to prevent traders from gaining a delusive credit, by a false appearance of substance to mislead those who should deal with them."

In *Cole v. North Western Bank*, L. R. 10 C. P. 354, 362, in the judgment of the Exchequer Chamber, it is said, "At common law, a person in possession of goods could not confer on another, either by sale or pledge, any better title to the goods than he had

[* 436] himself. To *this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But the general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledgor had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledgor with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bonâ fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited."

The policy of the Bankrupt Act, as explained by Lord HARDWICKE, went a good deal further. It took, in the event of bankruptcy, the property of the person who had left it in the hands of the trader to pay the general creditors of the bankrupt, though no credit had actually been obtained upon it; but I think it never was so unjust as to take his property, unless it was left by him in such circumstances as that credit might have been obtained upon it. This principle seems to have been lost sight of in some cases. I think, however, it was fully recognised and restored in *Ex parte Watkins*, L. R. 8 Ch. 520, 528. That was as to the claim of one who had bought and paid for wine, but left it in the custody of the vendor, who afterwards became bankrupt — as to goods, not as to chattels such as shares. But the principles explained by Lord SELBORNE are, I think, equally applicable to both. He says: "There is no inflexible rule of law that, because a man who was once the owner of goods and has sold them remains in possession of them, he must therefore be held to be the reputed owner. The statute does not say that. If he remains in possession with the reputation of ownership, and in those circumstances which create a reputation of ownership, then the property will pass to his assignees; but it is always a question of fact whether or no the circumstances are such as to create that reputation. . . . It is enough for the doctrine if those goods are in such a situation as *to convey to the minds of those who know their situation, the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the

knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. . . . So, on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to show that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything whatever about particular goods one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer the ownership to be in the person having actual possession."

MELLISH, L. J., says: "Reputed owners of the goods so left in their possession surely must mean reputed to be the owners by the persons who have dealings with them, and who might be deceived." And he adds: "I must also say I think it extremely desirable that, as far as can be done reasonably and consistently with the rules of law, the law should be so interpreted as to be in accordance with the customs of trade."

I now return to the form of the certificates in this case, which contain in them this note: "Note, in the event of sale or transmission this certificate must be surrendered with the deed of transfer, whether the deed transmits all or any of the shares, before the transfer can be registered, or a new certificate issued." I may deal with this more briefly, because a very analogous case, *Société Générale de Paris v. Walker*, 11 App. Cas. 20, has recently been decided in this House, and I see no reason to alter any part of what I then said. It was argued in the present case that a person remaining on the register and executing a transfer, or the transferee from such a person, would have a right to bring an action against the company who acted upon this note, and declined to register the transfer until the certificate was produced. I do not think so; if the company declined to do so after the non-production of the certificate was accounted for, as by proof that it was lost or destroyed, or that it was wrongfully withheld by some one who had no right to withhold it, I suppose a Court
*would, on proof of those facts, order registration; prob- [*438]
ably requiring as a condition that an indemnity should be given; but I continue to think that it is not wrong in the directors to act in the way which by this note they hold forth that they will act, and I think it at least doubtful whether, if they hastily and without inquiry registered the transfer, they might not incur

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responsibility to a pledgee who had the certificates with that note upon them if he suffered loss from their so acting. And the custom of trade, at least as far as regards the Stock Exchange, has always been that before the buyer of shares pays his money he is entitled to have delivered to him a transfer accompanied by certificates showing that the person who executes the transfer was the registered holder of the shares.

I think, therefore, it is clear that any one who was about to give credit to the bankrupts as being the owners of the entire interest in those shares ought to know that he had no legitimate ground for believing that they were such owners of the whole interest, unless the certificates were produced or accounted for. And any inquiry as to what had become of the certificates would (unless the bankrupts were fraudulent liars, which we have no right to assume) have led to the disclosure of the fact that they were pledged. I think, therefore, it is proved that the circumstances were such as to prove that the bankrupts were not reputed owners of the interest of the Colonial Bank in the shares, and that the order appealed against is wrong on that ground. The Judges below had not, in the case of the *Société Générale de Paris v. Walker*, perceived the importance of the production of the certificates, and they decided this case before this House had given their judgment on appeal in that case. They did not, therefore, notice this point.

On the construction of the proviso, I think that FRY, L. J., put the right construction on the proviso. The question, I think, is correctly said to be whether the expression "things in action," as used in this enactment, is intended to include shares in a railway company, which clearly are personal chattels, the property in which does not pass by mere delivery, but does pass by a deed of

transfer duly stamped (8 & 9 Vict. c. 17, ss. 14 and 16) [1439] when so delivered to the secretary and by him entered in

the registry: "And until such transfer has been so delivered to the secretary as aforesaid, the vendor, of the share shall continue liable to the company for any calls that may be made upon such share, and the purchaser of the share shall not be entitled to receive any share of the profits of the undertaking or to vote in respect of such share."

The principal argument used by the counsel for the respondent, and it seems to have prevailed both with COTTON, L. J., and

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LINDLEY, L. J., was that "choses in action," of which things in action is a translation, had a technical sense in our old law limited to the right to sue for a debt or damages. I do not think that made out. There always was a difference between personal property, such as to be capable of being stolen, taken, and carried away, and so to be the subject of larceny at common law, and to be capable of being seized by the sheriff under a *fi. fa.*, and other kinds of personal property. Personal property of the first sort, when belonging to a married woman, vested at once in the husband. The others the husband might reduce into possession, but did not have till he had done so. And when new kinds of property, like stock in the funds, or in more modern times shares in companies, were created, questions arose as to whether they were within the principle of being in possession or not; but till the phrase was used in the Act of 1869 it never became important to inquire whether they were to be called things in action or not. But it is noticeable that, in *Dundas v. Dutens*, 1 Ves. Jun. 198 (1 R. R. 115), Lord THURLOW, speaking of stock or the funds, said: "Those things, such as stock, debts, &c., being choses in action are not liable. They could not be taken upon a *levari facias*." The reason was the same as that for which they could not be the subject of larceny at common law, because they could not be seized. But Lord THURLOW thought choses in action an apt expression to use with respect to such things. Again, shares are not within the 17th section of the Statute of Frauds, because they do not pass by delivery; Lord DENMAN, in *Humble v. Mitchell*, 11 A. & E. 205, thought choses in action a proper phrase to express that idea. Again, in *Ex parte Agra Bank*, L. R. 3 Ch. 555, 560, WOOD, L. J., in *speaking of an assignment of shares, [*440] uses the phrase "whether in an assignment of a chose in action." He had no need to inquire whether it was a strictly correct phrase, but to him it appeared, as it had done before to Lord THURLOW and Lord DENMAN, that the phrase expressed the idea. And I think it was hardly disputed that, in modern times, lawyers have accurately or inaccurately used the phrase "choses in action" as including all personal chattels that are not in possession. In what sense, then, is it used in the 15th section of the Act of 1869, from which the present enactment is taken? It is not disputed that these words show that the Legislature intended to take policies of insurance out of the order and disposition clause.

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Why not shares in companies also? I cannot answer that question in any way satisfactory to my mind.

For this reason also, I think that the judgment is wrong, and that the judgment of the VICE-CHANCELLOR ought to have been that the plaintiffs are entitled to the relief prayed by the statement of claim.

I, therefore, propose that the judgment appealed against and the judgment of the 28th of July, 1884, therein affirmed be reversed; and that the costs of the appellants in this House and in the Court of Appeal be borne by the respondent.

Lord WATSON :—

My Lords, I also am of opinion that the judgments appealed from ought to be reversed.

The principle which appears to me to be deducible from the authorities, is this: that goods belonging to a third party are not within sect. 44 (iii.) of the Bankruptcy Act, 1883, unless they were left with the bankrupt in such circumstances that, as reputed owner, he could have sold them, or otherwise obtained credit upon them, in the course of his trade or business.

I do not think the 7018 shares in the Forth Bridge Railway Company were left in that position at the commencement of the bankruptcy of the firm of P. W. Thomas, Sons, & Co., and its individual partners. The appellants had at that time become the equitable owners of the shares, and were lawful holders of the certificates issued by the railway company, which bore upon [* 441] the * face of them an intimation that “ in the event of sale or transmission this certificate must be surrendered with the deed of transfer, whether the deed transmits all or any of the shares, before the transfer can be registered or a new certificate issued.” That is, in my opinion, an assurance by the company, upon which a lawful holder of the certificates is entitled to rely, to the effect that, according to their usual practice, the company will decline to register any transfer of shares until the relative certificates are produced, or their non-production is satisfactorily accounted for.

The case of *Société Générale de Paris v. Walker*, 11 App. Cas. 20, as decided by this House, is, in my opinion, a clear authority for holding that a transfer of these 7018 shares by William Evan Blakeway, after the certificates were deposited with the appellants,

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would not have been "in order." In other words, the transfer would not have been registered until some inquiry was made, and some evidence submitted to the railway company, showing that the certificates had been lost or destroyed. A truthful explanation would at once have revealed the equitable ownership of the appellants; so that the transfer could not have been made effectual, unless Mr. Blakeway had chosen to commit a new fraud, and possibly perjury as well. In that state of matters, I do not think Mr. Blakeway can be held to have been in a position to make an effectual sale of the shares in question, or to obtain credit upon them from any prudent customer. I cannot, therefore, hold that the shares were in his order and disposition in such circumstances that he was the reputed owner thereof.

I have had considerable difficulty in making up my mind upon the other question of importance raised in this appeal. But, on consideration, I have come to be of opinion, with your Lordships, that such shares as these are "things in action" within the meaning of the proviso in sect. 44 (iii.) of the Bankruptcy Act, 1883.

Lord FITZGERALD:—

My Lords, the two questions necessarily involved in this appeal are so important commercially and in relation to advances of money on the security of shares in public companies, that I feel *called on to express my reasons for concurring in [*442] opinion with my noble and learned friends.

These questions arise on the concluding sub-section of the 44th section of the Act of 1883, which now represents the order and disposition clause in bankruptcy, and it may be expedient to glance for a moment at the early history of the provision in the bankrupt law in this respect.

A somewhat ancient writer tells us that "although originally merchants were much favoured in our law, yet soon their number and cunning and their crafty dealings had so much increased that it fell out we had more need to make laws against them." Whether this is accurate or not in the present day, I do not know. We find in the earlier statutes bankrupt traders are dealt with very much as if criminals. The 34 & 35 Hen. VIII. c. 4, was enacted "against" such persons "as do make bankrupts." The 13 Eliz. c. 7, in dealing with who is a bankrupt, and how and by whom his body, lands, and goods shall be ordered for payment of the cred-

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itors, recites that "Those kind of persons do still increase and are like more to do if some better provision be not made for their repression." We find in the preamble of 1 James I. c. 15: "For that frauds daily increase amongst such as live by buying and selling, by such as wickedly and wilfully become bankrupts." We next come to the 21 James I. c. 19, which is, *inter alia*, "for inflicting corporal punishment on bankrupts" in some defined cases. That statute contained, in its 11th section, the first enactment on the subject of reputed ownership and extended to goods left in the possession, order, and disposition of the bankrupt with the consent of the true owner. It seems to have been intended by this section to repress dealings of third parties with traders which were in their nature fraudulent or were at least calculated to defraud creditors by obtaining for the trader credit on false and delusive appearances. The 11th section does not appear to have been put into actual operation for a long period after its enactment. It had almost become obsolete, and was first really expounded by Lord HARDWICKE more than a century afterwards. It was on the 11th section of that statute that he decided *Ryall v. Rolle*, 1 Ves. Sen.

348, and the case of *Joy v. Campbell*, 1 Sch. & Lef. 328 [* 443] (9 R. R. 39), arose before Lord REDESDALE in 1804 on similar words in the Irish Bankrupt Act, the 11 & 12 Geo. III. c. 8, s. 9.

In the latter case Lord REDESDALE observed: "Now that clause refers to chattels in possession of the bankrupt" — in his order and disposition with consent of the true owner — "that means where the possession, order, and disposition is in a person who is not the owner, to whom they do not properly belong, and who ought not to have them, but whom the owner permits, unconscientiously as the Act supposes, to have such order and disposition. The object was to prevent deceit by a trader from the visible possession of a property to which he was not entitled; but in the construction of the Act, the nature of the possession has always been considered, and the words have been construed to mean, possession of the goods of another with the consent of the true owner." He adds subsequently: "In all those cases in which that clause in the Act has been permitted to have the effect of divesting the right of the person who had a right to the property, the nature of the possession has always been considered and whether it was according to right." And again he adds: "It has been confined to those cases

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where the sole and absolute owner of the property has permitted it to remain in possession of the trader in whose possession it ought not to be."

It was of *Joy v. Campbell* that Baron Parke more than once observed that it contained "the best exposition of the law" (see 16 Meeson & Welsby, 286).

The order and disposition section of the Statute of James I. remained in substance unaltered down to 1869. In 1861 an Act passed which for the first time applied to non-traders the provisions of the bankruptcy statutes, but it made no alteration in the law as to the doctrine of reputed ownership, which in consequence became applicable to goods in the order and disposition of non-traders. Whether this was designed or whether it arose from oversight in not appreciating its full effect, I do not know. My impression is that there was no provision in any of the prior Insolvent Debtors Acts similar to the order and disposition clause. The decisions on reputed ownership had not been uniform, and some of them worked great injustice.

* A very distinguished Irish Judge (CHRISTIAN, L. J.), [*444] of whom I may also say that he was a master both in law and in equity, in *In re Hickey*, 10 L. R. Eq. 129, dealing with a case arising under the order and disposition clause, thus very vigorously expresses himself: "No interest whatever in the policy passed to the assignees by the vesting operation of the Bankruptcy Act. Assignees step into the shoes of the bankrupt. Nothing passes to them but what was beneficially the bankrupt's own at the time of the bankruptcy. Nevertheless the assignees assert that the order and disposition clause (sect. 313 of the Act of 1857) enables the Court of Bankruptcy to confiscate by a special order this, the admitted property of those two men, for payment of the debt of their assignor. Without going all the way with counsel for the appellant in calling that clause a penal one, we may admit that it is an exceedingly harsh if not an unscrupulous one. It is probably the only instance in our law in which, not only purposely, but avowedly, the property of one man is laid hold of to answer the debts of another. It dates back to the time of James I., if not earlier, and is an example of what most of us have occasion to note, that both the Parliaments and the Judges of those older times were bolder in initiative than their modern successors. Surveying the conditions with which the exercise of this exceptional

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and questionable power has been hedged round by this statute, it is impossible to avoid seeing that of all its requirements the most distinctive and central is 'the consent and permission of the true owner.' All the others may combine. The goods may be in the possession of the bankrupt, they may be in his order and disposition, he may be the reputed owner of them; but unless all this has been sanctioned by the consent and permission of the true owner, the clause rests as a dead letter. And it is this alone which redeems this law from the charge of naked confiscation. As the *mens rea* is essential for incurring the punishment of guilt, so the *mens volens* is essential for incurring the forfeiture imposed by this order and disposition clause."

The alterations in relation to "order and disposition" in the Act of 1869, sect. 15, sub-sect. 5, and carried further by the 44th section of the Act of 1883, sub-sect. iii., were probably [* 445] for *the purpose of excluding its operation altogether in the case of non-traders and of narrowing its effect as to traders. Thus by the Act of 1869 it is limited to cases of a bankrupt "being a trader," and in the Act of 1883 its operation is further confined to goods in the "possession, order, or disposition of the bankrupt in his trade or business." These expressions are capable of a different meaning and are by no means identical. Their construction has yet to be determined (see *In re Jenkinson*, 15 Q. B. D. 441).

Now, as to the first question of fact which it is necessary to decide on this appeal, viz., Were the shares in question "in the possession, order, or disposition" of the bankrupts, or of either of them, at the commencement of the bankruptcy, we have to consider the position of the parties.

The shares were registered in Blakeway's name, and in that respect he was the sole legal owner, but as such he was a trustee for his firm. Acting on behalf of the firm, he pledged the whole beneficial interest to the Colonial Bank, and he delivered to the bank the several certificates of the shares to be retained by them as pledgees. His name continued on the register as registered owner, but as such he was but a trustee — a trustee for the equitable pledgees — and if there was a surplus, as to that surplus for the firm. The firm had not "the reputed ownership," and in the view that your Lordships have expressed it will not be necessary to consider whether Blakeway's name being on the register placed

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him in "such circumstances as that he was the reputed owner." The shares were not in the order or disposition of the firm. Were they "in the possession, order, or disposition" of Blakeway? The contention that they were rests entirely on his name being still on the register, but something more is requisite. He should also have had the power of disposal. I adhere to what I said in *Société Générale v. Walker*, 11 App. Cas. 20, as to the nature of these certificates and the effect of parting with them, and am of opinion that, having pledged the shares to the Colonial Bank for value, and delivered to them the certificates to be held by them as their security, he ceased, under the circumstances, to have the power of disposal over the shares, unless possibly by the commission of * not only a fraud but a crime. I am of opinion [*446] that at the commencement of the bankruptcy these securities were not in the possession, order, or disposition of the bankrupt Blakeway within the meaning of the statute.

There remains the second question: Are shares of the character in question "things in action" within the meaning of the proviso which concludes sect. 44 of the Act of 1883? On this question I concur in opinion with my noble and learned friends, and adopt the reasoning of FRY, L. J. It seems to me, on a careful examination of the section and proviso, that the intention of the Legislature was to narrow very much the operation of the "order and disposition" clause so as to confine it to such goods as might be in the order and disposition of the bankrupt "in his trade or business," and, save in the case of "debts due to the bankrupt in the course of his trade or business," to exclude all those incorporeal rights which are not visible or tangible or capable of manual delivery or of actual enjoyment in possession in its ordinary sense, and which, if denied, can be enforced only by action or suit. It is unnecessary for me to express any opinion on another question which was most strenuously pressed in argument by the appellant's counsel.

Lord HALSBURY:—

My Lords, after the judgments which have been delivered, it is unnecessary to detain your Lordships by reading that which I had myself prepared. I concur in the motion of my noble and learned friends.

The Colonial Bank v. Whitney, 11 App. Cas. 446, 447.

LORD ASHBOURNE:—

My Lords, I entirely concur in the conclusion at which your Lordships have arrived.

The ordinary rule in bankruptcy is that the assignee takes the property of the bankrupt, but subject to all equities which affected it in his hands.

The question in this case arises on sub-sect. iii. of sect. 44 of the Bankruptcy Act, 1883, which includes in the property of [* 447] the * bankrupt “all chattels personal being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section.” The general policy of the order and disposition clauses of successive Bankruptcy Acts rests upon clear and intelligible principles. In the well-known case of *Ryall v. Rolle*, 1 Ves. Sen. 348, 371, it is laid down “that the general view and intent of the provision now under consideration was to prevent traders from gaining a delusive credit by a false appearance of substance to mislead those who should deal with them.”

The note appended to the certificates has been rightly pressed in argument. It was, at all events, an authoritative assurance by the company of their practice and course of dealing. Any one dealing with the bankrupts had no right to assume that they were the owners of the entire interest in the shares, unless the certificates were either forthcoming or their absence satisfactorily accounted for. Almost any inquiry would have shown the true facts of the case, and prevented the bankrupts gaining on this score “any delusive credit,” and I see no valid ground for holding that the bankrupts were the reputed owners of the interest of “the true owners”—the Colonial Bank—in the shares. I cannot act on the supposition that the bankrupts could or would by fraud or crime have endeavoured to account for the absence of the certificates. The property of a “true owner” must not be lightly confiscated.

I entirely concur in the judgment of FRY, L. J., as to the construction of the proviso and the meaning of the expression “things in action.” In the course of his judgment he used the following

The Colonial Bank v. Whinney, 11 App. Cas. 447, 448. — Notes.

words: "In the case of a partnership, the real and personal property of the partnership is or may be vested in all the partners, and each therefore may have a legal interest in choses in possession. In the case of a corporation the whole property of the concern is vested in the corporation, and the individual *cor- [* 448] porators have no direct interest in the chattels in possession which may belong to the concern. In a partnership of seven persons each would have a chose in action. If that partnership incorporated itself under the Companies Act, 1862, would each of the seven have "a chose in possession"? In the course of the argument in this House I addressed that question to the learned counsel for the respondent and failed to obtain any satisfactory reply. The special condition of the shares in question strengthens the view at which I have arrived. These shares were, at the date of the bankruptcy, divorced from their certificates, and must in any event to my mind be regarded as clearly things in action.

Order appealed against and judgment of Bacon, V.-C., therein affirmed reversed: Declared that the appellants (plaintiffs below) are entitled to the relief prayed by the statement of claim: Costs of appellants in this House and in both the Courts below to be paid by respondent. Cause remitted to the Chancery Division.

Lords' Journals, 29th June, 1886.

ENGLISH NOTES.

The above case is here set forth as instructive upon the meaning of various phrases which have been applied to certain descriptions of personal property. It is unnecessary here to collect cases on the subject of reputed ownership, as that topic has been fully dealt with under Nos. 5 & 6 of "Bankruptcy," 4 R. C. 58 *et seq.*

AMERICAN NOTES.

The Crimes Act of Congress of 1790 ch. 36, sect. 16, provided for the punishment of any one who should steal, &c., the personal goods of another at any place under the exclusive jurisdiction of the United States. In *United States v. Davis*, 5 Mason (U. S.), 356, it was held that the words "personal goods" in this statute did not include choses in action. In *United States v. Moulton*, 5 id. 537, it was held that those words did include bank-notes and coin.

In construing statutes, the question has several times arisen whether choses in action are included in the term "goods and chattels." In *Blain v. Ibb.* 25 Kansas, 199, for example, it was held that promissory notes and mortgages

No. 1. — Tobin v. Reg. — Rule.

were "goods and chattels" within a certain section of the tax law. So, in *Terhune v. Bray*, 16 New Jersey Law, 53, under a statute providing for an action of trover against the representatives of a deceased person who had converted the goods and chattels of another, it was held that the conversion of bonds and mortgages was actionable. See also *State v. Haight*, 35 New Jersey Law, 279.

On the other hand, in *Tingle v. Fisher*, 20 West Virginia, 497, the words "goods and chattels" in the recording Acts were held not to include mere choses in action.

In *Pippin v. Ellison*, 12 Iredell (Law) (North Carolina), 61, where choses in action were held not to pass under a bequest of "all the balance of my property," the Court said: "The word 'estate' has a broader signification than the word 'property.' The former includes choses in action. The latter does not; and in reference to personalty is confined to 'goods,' which term embraces things inanimate, — furniture, farming utensils, corn, &c.; and 'chattels,' which term embraces living things. — slaves, horses, cattle, hogs, &c." See *St. Joseph Hydraulic Co. v. Wilson*, 133 Indiana, 465, 472; *Reimer's Estate*, 159 Pennsylvania State, 212, 220.

PETITION OF RIGHT.

(And see 1 R. C. 815 *et seq.*; 8 R. C. 267 *et seq.*)

No. 1. — TOBIN v. REG.

(1864.)

No. 2. — THOMAS v. REG.

(1874.)

No. 3. — WINDSOR AND ANNAPOLIS RAILWAY

CO. v. REG.

(P. C. 1886.)

RULE.

A PETITION of right does not lie in respect of a pure tort done by a person in the government service; but it will lie for breach of a contract made by the authority of the government, whether resulting in a liquid debt or in unliquidated damages.

No. 1. — Tobin v. Reg., 33 L. J. C. P. 199, 200.

Tobin v. Reg.

33 L. J. C. P. 199-211 (s. c. 16 C. B. (N. S.) 310; 10 Jur. N. S. 1029; 10 L. T. 762; 12 W. R. 838).

*Petition of Right. — Liability of the Crown for the Wrongful Acts of a [199]
Naval Officer employed in the Suppression of the Slave-Trade.*

In a petition of right it was stated that a ship belonging to the suppliants, which was engaged upon the African coast and which was not registered as a British vessel, was seized and destroyed by an officer commanding one of Her Majesty's ships assuming to act under the authority of Her Majesty for the suppression of the slave-trade, in pursuance of the statutes in such case made and provided. The suppliants stated that their vessel was not at the time it was so seized and destroyed in any way engaged in the slave-trade, and prayed that they might be compensated for its loss, and for special damage which they had thereby sustained: — *Held*, first, that the officer by whom the alleged wrongful act was committed was not acting under the authority of Her Majesty, but in the performance of a duty imposed by Act of Parliament; secondly, that assuming him to have been engaged under the control and directions of the Crown, the act of which he was guilty was not done in execution of the powers to which he was restricted by Act of Parliament. But *held*, thirdly, that no proceedings in the nature of a petition of right to recover unliquidated damages could be maintained against the Crown for the trespasses of its officers or agents.

Petition of right to the Queen's most excellent Majesty, by T. Tobin and J. A. Tobin. The petition stated that the suppliants were shipowners, carrying on business at Liverpool under the firm of Tobin & Son. That for the purposes of a trade in which they were engaged upon the coast of Africa (where they possessed store-houses and factories), they had purchased a small vessel or packet-boat, then called *The Mary and Isabel*, but since called *The Britannia*; that this vessel was not when it was so purchased and (as it was intended to be used entirely upon the African coast) never was afterwards registered as a British vessel; that until it was seized and destroyed as thereafter mentioned, it remained the property * of the suppliants and was never in any way [*200] engaged in the slave-trade; that in the month of August, 1862, the said vessel was taken under the charge of William Mobbs, a seaman in the employment of the suppliants, to a place on the African coast called Cabenda, for the purpose of undergoing certain repairs; that she was then laden with palm-oil and planks; that these planks were not spare planks fitted for being laid down as a second or spare deck within the meaning of the statutes for

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the suppression of the slave-trade. The petition then stated that the said vessel lay dismantled at her moorings till the 20th of September, 1862, when she was seized as a vessel engaged in the slave-trade, by and under the orders of Captain Sholto Douglas, then being commander of Her Majesty's ship *Espoir*, and employed under the authority of Her Majesty for the suppression of the slave-trade, according to the statutes in such case made and provided, and on the alleged ground that the said vessel was not fit for a voyage to St. Helena, being the place within Her Majesty's dominions to which she ought to have been taken for the purpose of being brought to adjudication in the Vice Admiralty Court there touching the said seizure as aforesaid, she was afterwards, on the said last-mentioned day, with the said barrels of palm-oil and the said planks on board, wholly burnt and destroyed by the said Captain Sholto Douglas, so being such commander and so employed under the authority of Her Majesty as aforesaid and in the supposed exercise of his duties under such last-mentioned authority; that the said vessel was not at the time of her being so seized and destroyed as aforesaid, in any way engaged in the slave-trade or liable to be condemned as so engaged; that the value of the said vessel, palm-oil, planks, and other goods and property of the suppliants so burnt and destroyed as aforesaid amounted to the sum of £1000. The petition alleged special damage to the amount of £10,000, and prayed that Her Majesty would be pleased to do what was right and just in the premises and cause the suppliants to be reimbursed and compensated for the losses so sustained by them as aforesaid. To this petition the Attorney-General on behalf of the Crown demurred, and the suppliant, J. A. Tobin, (after suggesting the death of the suppliant T. Tobin), joined in demurrer.

After argument, in which the Attorney-General for the Crown was not called upon for a reply, the Court took time for consideration.

[203] Judgment of the Court (ERLE, Ch. J., WILLIAMS, J., WILLES, J., and KEATING, J.), was delivered by —

ERLE, Ch. J. — In this case the suppliant has petitioned for the amount of damages sustained by him from the loss of his vessel, and by the demurrer to the petition the following facts are admitted, viz., that the vessel was seized as being engaged in the

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slave-trade by Captain Douglas: that he commanded a ship of Her Majesty's, and was employed for the suppression of the slave-trade, according to the statutes relating thereto, and that the vessel of the suppliant was afterwards destroyed by him in the supposed performance of his said duties, and that the vessel was not at the time when it was so seized and destroyed in any way engaged in the slave-trade, or liable to any proceedings as if it had been so engaged. This statement shows a wrong for which an action might lie against Captain Douglas. But we are all of opinion that it does not show a complaint in respect of which a petition of right can be maintained against the Queen, and for this opinion we rely upon three grounds.

First, that Captain Douglas in seizing the vessel was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed upon him by Act of Parliament. Secondly, if it be assumed that he was an agent employed by the Queen to seize vessels engaged in the slave-trade, that he was not acting within the scope of this authority in seizing a ship not engaged in the slave-trade, and for that reason did not make his principal liable for a seizure made without authority from that principal: and, thirdly, that a petition of right cannot be maintained to recover unliquidated damages for a trespass. As to the first ground, if the vessel of the suppliant had been lawfully seized, Captain Douglas would have performed a duty imposed upon him by the statute 5 Geo. IV. c. 113. s. 43, enacting that vessels engaged in the slave-trade shall be seized by the commanders of ships of Her Majesty; and although it is admitted that he was appointed to the ship and ordered to the station and employed by the Queen, still we think that the duty which he had to perform in relation to the slave-trade was not created by command of the Queen, nor would he have been doing an act which the Queen had commanded if the seizure had been made lawfully under the statute. The allegations on the record show that the seizure, although intended to be in accordance with the provisions of the statute, was unlawful, because not authorised. They further show that the vessel was not seized for the purpose of making it the property of Her Majesty, and that, if lawfully seized, it could not have been in possession of Her Majesty, but that under sect. 44 the captors had the duty of taking it to the Vice Admiralty Court for condemnation, and, if condemned, the captors were bound to sell it and divide

the proceeds of the sale, and it would not be till after these contingencies had happened and the sale had taken place that the interest of the Crown in a share of the proceeds of the sale, according to the statute, would commence. By sect. 35 the captors would have been liable to a judgment against them in that Court for damages and costs if they had been found to be in the wrong. Thus, as Captain Douglas would not have been an agent of the Crown if he had lawfully seized and kept the vessel under the statute, still less ought he to be held to be such agent in seizing and destroying it unlawfully.

Secondly, if it be assumed that Captain Douglas had authority from the Crown to seize all ships engaged in the slave-trade, so that the seizure if lawful would have been made by him in the capacity of agent for the Crown, still, if he seized a ship not engaged in the slave-trade, he would not act within the scope of that authority, and would not make his principal liable for that wrong. Thus, where a warrant was granted by the Secretary of State to apprehend the author of "*The North Briton*," and the defendant upon good grounds of suspicion apprehended the plaintiff, who proved that he was not the author, the defendant was held not

to have acted in obedience to that warrant, and to be responsible without * a justification therefrom. *Money v. Leach*,

[* 204] 3 Burr. 1992. It is unnecessary to cite authorities to show

that the agent cannot make the principal liable for an act done beyond the scope of his authority. The general rule is not disputed. But the claim of the suppliant to hold the Queen liable for the act of a captain in Her Majesty's navy was rested upon a supposed analogy between the relation of servants to masters and bailiffs to sheriffs on the one hand, and the relation of persons in Her Majesty's service to the Queen on the other hand; so that as a master is liable for any wrong done by his servants in the course of their employment in his service, and a sheriff is responsible for any wrong done by his under-sheriff or his bailiffs in the course of performing the duties of the sheriffalty, so the Queen ought to be held responsible for any wrong done by a captain of the navy in the course of his employment. It is unnecessary to cite authorities for the purpose of showing that masters and sheriffs are so liable; the law on this subject is in constant application. But the argument of the suppliant fails because, in our judgment, there is no analogy between the relation of a captain of a Queen's ship to

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the Queen and the relation of servant to master, or of bailiff to the sheriff.

The liability of a master for the act of his servant attaches in the case where the will of the master directs both the act to be done and the agent who is to do it. The act of the servant is then held to be the act of the master, and the servant acting in the course of his employment is a general agent in that employment, and makes his principal liable for all that he does within the scope of his authority as such general agent; and, further, in respect of all his acts within the scope of that authority they are the acts of the principal, notwithstanding any private arrangement to the contrary between the principal and such agent. This doctrine is frequently exemplified in cases of collision either by land or water. The master is liable for the act of the coachman employed by him to drive his horses, whether he was so employed for a single drive, or in constant service, and notwithstanding the orders were to drive slowly and on the proper side, and the coachman drove fast or on the wrong side. The master is held responsible upon the ground that he has put the servant in his place to perform a service ordered by himself, and over which he has absolute control at all times.

It is needless to cite the cases showing where the liability attaches, but we refer to some classes of decisions in which the limits of the liability are defined, in order to show that the analogy supposed by the suppliant does not exist. Where the duty to be performed is imposed by law, and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment. On this principle it has been declared that superior public officers, such as the Postmaster-General, the Lords Commissioners of Customs and Excise, the Auditors of the Exchequer, and the like, are not responsible for the negligence or misconduct of inferior officers in their several departments, though the superior officers appointed them and had the power of dismissing them. See *Whitfield v. Lord Le Despencer*, 2 Cowp. 754. So also unpaid trustees appointed under Acts of Parliament for local purposes employing men to perform a public duty are exempt from some of the responsibility which is incurred by the employer of men to work for his own interest: *Sutton v. Clarke*, 6 Taunt. 40; *Harris v. Baker*, 4 M. & S. 27; and see *Duncan v. Findlater*, 6 Cl. & F. 903. So also the captain of a ship

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employing a pilot is not responsible for damage caused by the ship when under the control of the pilot, for the pilot performs a duty imposed by Act of Parliament, and is not under the control of the captain. *Lucey v. Ingram*, 6 M. & W. 302, 9 L. J. (N. S.) Ex. 196. So the employer of a licensed drover whose keeper causes damage is not responsible, because the drover has a distinct calling, and a duty imposed by law, and the helper is the servant of the drover. *Milligan v. Wedge*, 12 Ad. & E. 737, 10 L. J. (N. S.) Q. B. 19. Furthermore, when the agent is not appointed by the will of the

employer, such employer is not responsible for the wrong [* 205] done by the agent. * Thus, the employer of a contractor to perform a contract for work by himself and his fellow workmen is not responsible for the contractor's workmen, as he did not choose them. *Reedie v. The London and North-Western Railway Company*, 4 Ex. 244, 20 L. J. Ex. 65. So the hirer of horses to be driven by the coachman of the horse-letter is not responsible for that coachman, for the same reason. *Laugher v. Pointer*, 5 B. & C. 547, 4 L. J. (K. B.) 309; and *Quarman v. Burnett*, 6 M. & W. 499, 9 L. J. (N. S.) Ex. 308. Again, where the wrong is done in the performance of an act by the servant which the master has not directed, the master is not responsible. Thus, where the coachman had driven his master's carriage to the stable, and then drove out again for a purpose of his own, without his master's order, and contrary to his duty, and in so driving caused damage, the master was not responsible. The drive was not by his order, and he therefore was not driving by the hand of his servant. *Mitchell v. Cross-weller*, 13 C. B. 237, 22 L. J. C. P. 100. Upon this review of the cases we think that the supposed analogy between the relation of the Queen to a captain in Her Majesty's navy, and the relation of a master to a servant, fails in the following respects: — First, that the Queen does not appoint a captain to a ship by her own free will, as a master chooses a servant, but through an officer of state, responsible for appointing a man properly qualified. And, secondly, that the will of the Queen alone does not control the conduct of the captain in his movements, but sense of professional duty. And, thirdly, because the act complained of was not done by order of the Queen, but by reason of a mistake in respect of the path of duty.

Then, with respect to the supposed analogy to the responsibility of the sheriff for the under-sheriff and bailiff, we think we

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need not distinguish it further than by saying that the sheriff is under responsibility which is peculiar to that office. The under-sheriff is a general agent for the sheriff in respect of the duties of the sheriffalty to the fullest extent, with the unusual power for the deputy to appoint a deputy and make the principal responsible for every act of a bailiff done under the warrant issued by the under-sheriff. As we do not suppose that the suppliant would place any such reliance on the responsibility of the sheriff for his bailiffs, as of itself establishing the responsibility of the Queen for every party employed in the administration of government, we do not say any more on the point than that on these two narrower grounds our judgment is for the Crown.

On the third ground above mentioned — namely, that a petition of right cannot be maintained to recover unliquidated damages for a trespass — our judgment is also for the Crown. The complaint is of a wrong done in destroying a ship, and the claim is for damages the same as might have been awarded if instead of a petition of right an action of trespass had been brought against the trespassers. For the purpose of showing that a petition of right cannot be maintained for this complaint, we purpose to refer, first, to the principle that the sovereign cannot be guilty of a wrong, and so cannot be made liable to pay damages for a wrong of which he cannot be guilty, and then to the authorities which show where a petition of right will lie (premising that the statute 23 & 24 Vict. c. 34, alters only the form of procedure to be adopted by suppliants resorting to a petition of right, and does not alter the law relating to the subjects for which the petition can be maintained, it being declared by sect. 7 that no remedy was thereby given which was not before existing). The maxim that “the King can do no wrong” is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong; that which the sovereign does personally the law presumes will not be wrong; that which the sovereign does by command to his servants cannot be a wrong in the sovereign, because if the command be unlawful, it is in law no command, and the servant is responsible for the unlawful act in the same way as if there had been no command. Lord Hale says, “The law presumes the King will do no wrong, neither indeed can do any wrong; and, therefore, if the King command an unlawful act to be done the offence of the instrument is not thereby indemnified. But though

the King is not under the coercive power of the law, in [*206] * many cases his commands are under the directive power of the law, which, consequently, makes the act itself invalid if unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law." Lord Coke also says to the same effect, in commenting on *preceptum Regis* in the statute Westm. 2 (2 Inst. 186): "The King being a body politick cannot command but by matter of record, for *Rex præcipit* and *Lex præcipit* are all one, for the King must command by matter of record according to the law;" and he adds, "Markham said to King Edward the Fourth, that the King could not arrest any man for suspicion of felony as any of his subjects might, because if the King did wrong the party could not have his action. If the King command me to arrest a man and I do arrest, he shall have his action of false imprisonment against me albeit he was in the King's presence;" and he adds, that Bracton says: "Nihil aliud Rex potest quam quod de jure potest." To the same effect is 3 Black. Com. 246: "The King can do no wrong, which ancient and fundamental maxim is not to be understood as if everything transacted by the government was of course just and lawful, but means only two things: first, whatever is exceptionable in the conduct of public affairs is not to be imputed to the King, nor is he answerable for it personally to his people, for this doctrine would destroy the constitutional independence of the Crown; and, secondly, that the prerogative of the Crown extends not to do any injury." (This maxim has been constantly recognised, the notion of making the King responsible in damages leading to consequences that are clearly inconsistent with the duty of the sovereign.)

We come now to the authorities showing where the petition of right will and will not lie. We pass the class of claims founded on contracts and grants with brief notice, because they are within a class legally distinct from wrongs. (In *The Bankers' Case*, 14 Howell St. Tr. 53, 54, Lord SOMERS so treats them, giving various instances of petitions for money on account of wages, work, debts, and goods founded on contract, and he makes no allusion to a claim against the King for damages for a wrong.) We pass from the class of claims on contract, in all systems of law distinguished from claims founded on wrong, and proceed to the more numerous class of claims, where petitions of right have been brought in respect of property either wrongfully taken or wrongfully with-

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held on behalf of the Crown. As a general principle, property does not pass from the subject to the Crown without matter of record. In the time of feudal tenures rights in property accrued to the Crown on very many occasions, and officers had the duty of enforcing these rights of the Crown. The right accrued on some of these occasions by matter of record, and on other occasions power existed for making the right matter of record by office found. The officers seized or justified seizures under these records, and their right to seize was a subject of frequent contest, tried either by petition of right, or *monstrance de droit*, or traverse of office found. It has been said that the petition of right took its origin under Edward the First, and was substituted for a *præcipe* against the King; and it has been suggested that if the fact were so, it would indicate that an action lay against the King where it would lie against a subject, that is, where a *præcipe* might issue. But, in our opinion, the point relates to procedure only, and not to the law of right, and therefore is not material in the present inquiry. The authority for the notion is found in Fitz. Abr., tit. "Error," pl. 8. (22 Edw. III. 3 b) A petition of right had been referred to Parliament, and the Parliament ended; and it was decided that the petition of right was thereby brought to an end also. At the end of the *placitum* containing this discussion Fitzherbert adds: "Et fuit dit . . . qu'en temps le Roi Henry et devant, le Roi fuit implede come fuerunt autres communes homines, mes Edward Roi son Fitz ordeigne que homines suevoient versus Roi per petition, mes unques Roi ne seroit adjudge sinon par euxmêmes et leur justiciariis."¹ To this we subjoin a counter-authority from Brooke, tit. "Petition," Part 12 (24 Edw. III. 55 b), where Wilby, speaking of a petition in some cases, and a traverse of office in others, "Dixit *qu'il avera [* 207] tel brief precipe Henrico, regi Angliæ et in le lieu du ceo est ore donné petition per le prerogative."² To this *dictum* of Wilby, Brooke, Ch. J., adds: "Quære de tyel brief car videtur quod nunquam fuit Lex, car le Roi ne peut escrire ni countermaund lui

¹ The passage is thus quoted from the Year Book in Allen on the Royal Prerogative, p. 190: "Fuit dit—que en temps le Roy Henry et devant le Roy fuit implede come serroit auter home de people: mez Ed. Roy son fitz ordeign que home sueroite vers Roy par petition."

The passages from the Year Books are there collected.

² Allen, *ubi supra*, quotes this passage thus: "Jaye vüwe jadis tiel brief pr. Henry Regi Angliæ, &c. en lieu de que est ore don petition pour son prerogative."

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mesme." If it were necessary to decide whether the subject had a right to proceed by a settled form of writ, called a *præcipe*, against the King, before the petition of right was introduced by Edward the First, we should incline to the negative, for the reason given by Brooke, Ch. J., and because before and in the time of Edward the First the rights of the people were deriving their origin after the Conquest by grants from royal charters, and were in the course of gradual extension by confirmations of charters, and by such statutes as the following, namely: "Articuli super Cartas," for enforcing such charters, and the "Statute of Petitions," 8 Edw. I., which, reciting the grievance to the folk who come to the King in Parliament, by the throng of the petitions, whereof the most part might have been despatched by the CHANCELLOR and the Justices, provides that all petitions which touch the Seal do come first to the CHANCELLOR, and those which touch the Exchequer do come to the Exchequer, and those which touch Justices in law of the land do come to Justices, and those which touch Jewry do come to the Jewry's Justices; and the "Ordinance of Petitions," 21 Edw. I., whereby the King ordained that "all the petitions which shall be delivered to them, whom he has assigned to receive them, shall be all at once well examined, and that those which touch Chancery be set in one, and those which touch the Exchequer in another place, and so with those that touch the Justices, and those which be before the King and his council in other places."

From these statutes and ordinances it is clear that many complaints were disposed of by personal application to the King in Council; and it is not probable that the subject should have a defined right to a writ against the King, when the rights between subject and subject, and the writs for enforcing them, were in an unsettled state. But whatever was the form of procedure, the substance seems always to have been the trial of the right of the subject, as against the right of the Crown, to property, or an interest in property, which had been seized for the Crown; and if the subject succeeded, the judgment only enabled him to recover possession of that specific property, or the value thereof, if it had been converted to the King's use. The form for trying this question has gone through several changes. *Traverse of office* found, *monstrance de droit*, and a petition of right were the forms in most frequent use. Amendments of the procedure were made

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by the statutes 34 Edw. III. and 36 Edw. III., and 2 Edw. IV., allowing many questions to be raised by traverse in cases where theretofore a petition of right was necessary; and much learned discussion is to be found in the books relating to the use of these different forms. Lord Coke has much learning thereon, both in his Commentary on these statutes for substituting traverse for petition, 2 Inst. 68; and in his judgment in the case of the *Saddlers' Company*, 4 Co. Rep. 58. In *Coningsby and Mallon's Case*, Temp. Hen. VIII. Keilway, 154, all the Judges give separate judgments of much research, to the effect that a *monstrance de droit* was wrong in that case, and that the plaintiffs ought to have had a petition. The form of proceeding was much considered, for the reporter adds, that the CHANCELLOR gave judgment for an *amoveas manus*, without the advice of any Justice or King's counsel, "Et hoc contra legem ut dicitur et fuit dit qu'il ceo qu l'office fuit trouvé par le faux subtilite de Sir Richard Empson et Dudeley en le temps de l'auter Roy les queux fuerent les hants et cruels approvers," &c. In *The Bankers' Case* Lord SOMERS has made an elaborate collection of learning relating to the form of proceedings against the Crown, and he adjudged that a petition of right was the proper form for recovering payment of an annuity granted by the Crown. The subject, therefore, has been amply considered; the authorities are abundant, and we refer to them as establishing strongly the negative proposition that a petition of right does not lie to recover damages from the *King for a mere wrong supposed to have [*208] been done by him. Not a single instance of a recovery of such damages from the King has been cited. The force of this negative evidence is increased by many considerations. The occasions for using the remedy, if it existed, were frequent; the right to seize the property of men, either outlawed or attainted or heirless, would be certain to lead to contested claims from its unlimited extent. It is probable that wrong would be done by the King's officers enforcing such a right from its undefined limits; and it is clear that wrongs were so done from the provisions made for giving redress. As early as Edward the First, in the statute Westminster 2, "Articuli super Cartas," c. 18, is an enactment making escheators liable for any wrongs they may do in seizing for the Crown, and in case of their inability to pay, giving recourse to the superior escheator; and in c. 19 is an enactment,

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that after a judgment of restitution, in case of a wrongful seizure, all the issues and profits between the seizure and the restitution should be fully restored. Lord Coke, in his comment on this chapter, says: "Issues meant profits not paid over; but money once in the King's coffers shall not be restored." It is likely that such a rule would not prevail if the question arose now; but we refer to it as showing an improbability of paying unliquidated damages for a wrongful seizure, when the restitution of the profits made by the wrong was so imperfectly enforced. Throughout these enactments no mention is made of a remedy against the King for compensation in damages: the redress to be obtained is restitution only. If damages are sought, they are to be obtained, if at all, from the officer who did the wrong. Where the question raised by a demurrer to a petition of right was, whether the Crown was responsible for negligence in servants employed under the Crown, whereby damage was caused, Lord LYNTHURST decided in the negative. *Lord Canterbury v. The Attorney-General*, 1 Phill. 306. His words are, "For the personal negligence of the sovereign, neither this or any other proceeding can be obtained; upon what grounds, then, can it be supported for acts of the agent? If the master is answerable, on the principle *Qui facit per alium facit per se*, this does not apply to the sovereign, who cannot be required to answer for his personal acts. If the master is responsible, by reason of his negligence, in retaining a careless servant, this principle does not apply to the sovereign, to whom negligence cannot be imputed. As to damages done by ships of war, the commander is not responsible for damage done by one of the crew without his participation. But if the principle now to be contended for be correct, the negligence of the seaman in the service of the Crown would raise a liability in the Crown to make good the damage, which might be enforced by a petition of right." He then refers to the authorities, and discusses *Gerreis de Clifton's Case*, Year Book, Pasch. 22 Edw. III. fol. 50, pl. 12, after mentioned, and decides that the petition of right could not be maintained. So also where the chief officer of the marine at Calcutta made an order against employing the steam-tug of the plaintiff, and thereby caused loss, it was held, upon appeal, that no suit could be maintained, for reasons not here relevant; but in disposing of the question whether the defendant below could justify a

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wrong under the order of the supreme government, the Court says, p. 237, "If the act which he did was in itself wrongful as against the plaintiffs in the Court below, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorised, or whether it were done by the order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice if its agents were not personally liable for them. *Rogers v. Reffindine Dutt*, 13 Moo. P. C. 236. For an example of the liability of an officer in the employment of the Crown, we refer to the case of *Madrazo v. Willes*, 3 B. & Ald. 353, where the captain of a man-of-war destroying a Spanish slave-ship wrongfully, but as he believed in performance of his duty, was held to be liable to the Spanish owner for damage to the amount of £20,000. When the claim was for a sum of money alleged to have been specifically appropriated to the suppliant, and the objection was made that a petition of right was not maintainable *for [*209] such a claim, the Court did not decide against the suppliant on this point because it had many clear grounds of judgment against him on other points. On this point the Court says, "Considering the length of time that has expired since anything has been practically done in a petition of right, the imperfection of all the authorities and the obscurity that hangs over this portion of the law, the course that has been taken (in hearing the case to the end upon the merits and upon form) can hardly excite surprise, much less should it provoke censure." *Baron de Bode's Case*, 8 Q. B. 271. If the Court entertained so much doubt about allowing the suppliant to proceed when claiming a sum of money said to be specifically appropriated, it probably would have decided without hesitation against a claim for damages for trespass. We have said that the suppliant adduced no case in which damages had been recovered against the King for a wrong. He pressed on our attention the *Case of Conrad of Colerne* to prove the contrary, but as we understand it the case has not that effect. There the suppliant had joined a Dutchman in sending a cargo of oats to London, which were shipped from Cornwall in the Dutchman's ship, and when it arrived in London war had been declared between England and Holland. The ship and cargo were seized as the property of an enemy, but as half

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the cargo belonged to an Englishman, his petition for a restitution of his moiety of the oats would be normal. His claim would be for a specific chattel, not for damage. On the argument much reliance was placed on the *Case of Gervais de Clifton*, and we therefore examine it at length. There the suppliant suggested that divers trenches and gatters were made in "l'eau de Trent" by the wardens of the castle of Nottingham, whereby his lands were "surroundis" (surrounded or inundated), to his damage. This petition was sent to the CHANCELLOR, and by him to an inquisition in due course. By the sequel it was found that the suggestion was true, "et outre que trenches furent faits en soil," by the wardens, whereby the King had built four mills, whereupon the suppliant presented a second petition, "Priant restitution de ses damages et que ceo soit redressé." This petition was indorsed to be sent to the CHANCELLOR, that he should send it and the verdict on the inquest to the King's Bench, and that the Justices there should cause to come before them the wardens, "qui oï sont et les serjeants du Roi et qu'ils fassaient droit." The CHANCELLOR sent the tenor of the verdict, and on objection that he should have sent the verdict, the plaintiff was directed to bring it if he wished to proceed, and the wardens were discharged from further attendance. So the proceeding seems to have ended. The brevity of the report makes it obscure: but as we understand it, the statement shows a dispute between the owners of a dominant and a servient tenement in respect of the water to a mill. The petition seems to admit a right to the easement, but complains of an excess in the exercise of the right, whereby the lands of the suppliant had been surrounded (or inundated), and prays a restitution of his damages, and that this should be redressed. The indorsement that the petition should be sent to the King's Bench, and that the wardens for the time being and the serjeants of the King should attend as parties to the case, shows that an important question of right was in issue, for the attendance of such persons would be incongruous if the question was the value of the crop damaged by the water. The report, as it stands, is not, as we read it, a precedent for a claim of damages for a wrong, but a suit to try a right, and whatever was the claim, nothing was decided in relation thereto. This view of the effect of the report is confirmed by referring to *Robert de Clifton's Case*, Rot. Parl. 13 Edw. II. No. 3 — see *Baron de Bude's Case*, by Anstey

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p. 59. We gather from this record that weirs in the Trent, and watercourses therefrom, to the castle mills, through the lands of the Clifton family in Wyleford, had been made by Robert de Tiptoft, sometime warden of the castle, probably in the time of one Gerveis de Clifton, to whom Robert succeeded as kinsman and heir, and that turfs had been taken from the same lands from time to time, to repair and maintain the weir and watercourse. The petition does not deny the right of the wardens thus to act, but claims compensation, because, in the exercise of the right, damage was done to the land. In this case also nothing appears to have been decided, *but the [*210] question to have been tried, if the case had gone on, was, whether the suppliant should have some compensation. The first petition of right, by Robert, on his coming to the property, is not found, but the commission and requisition founded thereon show its nature. The commission was to Whatton and Wiltoughby, on the plaint of Robert, kinsman and heir of Gerveis de Clifton, showing that the wardens had made weirs and trenches through the meadows, "which were of Gerveis, and unto Robert, after his death descended, as in our hand they now exist, and the Trent water out of its right and ancient course had led, whereby the lands circumjacent had oftentimes been overflowed, and have dug, and from day to day, come to dig from the said meadow, turfs for the reparation of the weirs and trenches, so that he, Robert, the profit of his meadows in everywise doth lose, whereupon he hath prayed relief; whereupon the King, in order that right should be done, wills to be certified how many trenches and weirs had been made, and in what places the water of the Trent had been diverted, and what damages to the said Robert have chanced and do chance yearly, and what profits unto the King and his castle, from the trenches and weirs, do yearly chance, and by what wardens and out of what turfs the trenches and weirs were made, and so directs an inquest to be held." The return of the inquisition showed that two weirs had been made in the Trent, and two trenches had been made through the midst of the said meadows, and the Trent water thereby turned out of its right course, whereby the meadows have been inundated; and the wardens have dug turfs in the lands for reparation, whereby profits have been lost, and the damages which have already chanced to Robert are £19, and damages do yearly chance to the

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value of £10; and they say that the trenches and weirs are to the profit of the King and his castle to the value yearly of £20; for without that watercourse four of the mills to grind are unable, and that Robert de Tiptoft made the trenches and weirs. The second petition of right grounded on this commission and inquisition prayed that allowance may be made unto the said Robert of the damages aforesaid, and prayeth the said Robert, if it please the King and his council, that the bailiwick of the house of Peverill may be assigned to him, in recompense for his aforesaid damages. The indorsement on this petition is special, and shows that an important interest was in dispute. "For that this thing doth touch the King so highly, and the said inquest is but of office, let there be some great men of the King's council assigned to survey, inquire, and certify the King." We consider that the right is not disputed, either to the watercourse or the turbary, because there is no complaint of trespass in digging the trenches or the turfs, but there is a hardship or grievance resulting either from an excessive or a neglectful exercise of the right, whereby an overflow, with damage, was caused, for which the suppliant seeks compensation. In *Robert's Case*, the bailiwick of the house of Peverill is the recompense proposed. In *Gerreis's Case* the restitution of his damages, and that the overflow may be redressed, is the subject of the prayer. In each case the petition is for relief from the exaction of servitude in excess beyond the right of the dominant tenant, which is in effect a petition that the King would remove his hand from the property of the servient tenant to the extent of the excess. These cases should be read with the remembrance that neither of them advanced beyond the first stage; in neither was there a trial of the contested facts or of the law applicable thereto. There may have been a local custom relating to Trent water within the liberties of Nottingham or the honour of Peverill. We find in Domesday, under the head "Nottingham Boro," a trace of a local custom relating to the Trent, "*Aqua Trentæ et via versus Eboracum custodiuntur ita ut si quis impedierit transitum navium et si quis araverit vel fossam fecerit in viâ regis infra duas perticas emendare habet per viii libras.*"

There may have been a grant by those from whom the property was derived to the suppliants. We see in Domesday, under the head of "Tevro Wilhelmi Peveril, in Nottinghamshire," that

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he held Wyleford and Clifton and a part of Nottingham Boro'. There may have been unity of possession severed when the Crown became possessed of the honour of Peverill of which Robert de Clifton desired to obtain the bailiwick ; and the right to take the water and the *turfs may have been subject [*211] to the duty of making compensation for any damage caused by the exercise of the right. We refer to these matters of conjecture consistent with the facts as they are stated in the cases ; and on the review we come to the conclusion that principle and authority coincide in showing that a petition of right lies not to recover unliquidated damages for a mere wrong, and that neither of the cases of the Cliftons are an authority for a contrary conclusion, and we adopt Lord LYNDHURST's remarks on *Lord Canterbury's Case* as confirmatory of that conclusion. He remarks that *Gerreis's Case* went off because the tenor of the verdict, and not the verdict itself, had been returned to the Queen's Bench (a defect easily cured if the claim could be supported, but it does not appear to have been renewed) ; and that the complaint of a similar grievance to the same property, by the wardens of Nottingham Castle, in the 18th of Edward the Second ; and the prayer for the favour of an appointment to be steward, indicated that the wardens had a right to bring the water to the castle mills, and did what was complained of in exercise of a right, and that the complainant was not demanding a right, but begging some gift on account of a hardship suffered by him.

To these reasons and authorities we would add an opinion that there is good ground for maintaining that which we find to be the law on this subject. We think that if each of the Queen's subjects who believed he had been at any time, in any reign, wronged in the administration of civil or military affairs, could sue the Queen for the time being for the amount at which he might estimate his damage, the extent of pernicious result would be great. And we refer to the petition of right adduced in evidence in *Irvine v. Sir George Grey*, 3 Fost. & Fin. 635, as an example of the mischief that might arise if such was the law. By that petition the suppliant, in 1861, sought compensation for a series of alleged wrongs in the course of legal proceedings, beginning in 1834, wherein he was convicted of a misdemeanour in representing that an assistant barrister had resigned ; and a Mr. Johnston was acquitted in a prosecution of perjury instituted by Mr. Irvine.

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The wrongs imputed were the withholding from the juries certain letters, and the guilt of these wrongs was imputed to Mr. Lyttleton, Lord Morpeth, and Lord John Russell, secretaries for Ireland, and the Attorney-General and the Crown Solicitor in Ireland at the time, respectively. The question to have been tried would have been whether the wrongs were committed so as to damage the suppliant, that is in effect to try, in 1861, whether some verdicts returned in 1834-5 were right, and if not, whether her present Majesty should compensate Mr. Irvine for the damage sustained in paying costs and in being imprisoned and fined, and also in being disinherited by his father, by paying to him £100,000, or so much thereof as the jury might give.

Upon each of the three grounds above mentioned our judgment is for the Crown.

Judgment for the Crown.

Thomas v. Reg.

L. R. 10 Q. B. 31-46 (8. c. 44 L. J. Q. B. 9 : 31 L. T. 439 ; 23 W. R. 176).

[31] *Petition of Right, when it will lie. — Unliquidated Damages for Breach of Contract. — 23 & 24 Vict. c. 34.*

A petition of right will lie for a breach of contract resulting in unliquidated damages.

So held on the authority of the Bankers' Case (14 How. St. Tr. 1).

This was a petition of right.

1. That previously to the year 1859 the suppliant had devised and invented a system of heavy rifled artillery, and desired that the same should be introduced into and adopted by the public departments of Her Majesty's service, and that the suppliant having *subsequently had various interviews and correspondence upon the subject with the then Secretary of State for War, it was mutually agreed by and between the suppliant and the Secretary of State for War that in consideration of the suppliant referring such invention to the ordnance select committee at Woolwich, and of such committee receiving from the suppliant such descriptions and drawings or models as might be necessary for their elucidation, to be retained for future reference and to enable the committee to give an opinion on the subject, and of the suppliant attending the committee in order to give his personal explanation, that in the event of the invention being approved of, and being adopted in Her Majesty's service, a reward

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in that behalf should be given by Her Majesty's government to the suppliant, and that the amount of the reward should be determined by Her Majesty's Master-General and Board of Ordnance. Averment that all conditions precedent have been fulfilled, yet the amount of the reward had not been determined, nor had the same or any part thereof been paid to the suppliant.

2. That the suppliant having invented certain artillery constructed upon a new principle, and having in his possession certain plans and drawings explaining the same, and having incurred heavy costs, charges, and expenses in perfecting the invention, in consideration of the suppliant showing and delivering up his plans to Her Majesty's government, Her Majesty's government promised the suppliant that, in the event of certain trials then about to be made of the artillery showing a successful result as far as the principle was concerned, the expenses to which the suppliant had been put should be reimbursed to him by the government. Averment that all conditions precedent had been fulfilled, yet Her Majesty's government had not reimbursed the sum to the suppliant.

Demurrer to the petition of right and the two paragraphs thereof. Joinder in demurrer.

Jan. 8, 9. Sir R. Baggallay, A.-G. (Holker, S. G., and C. Bowen, with him), in support of the demurrer.

W. Williams, Q. C., *contrà*.

The arguments and authorities cited appear in the judgment.

Cur. adv. vult.

* Nov. 20. The judgment of the Court (BLACKBURN, [* 33] QUAIN, and ARCHIBALD, JJ.) was delivered by

BLACKBURN, J. — This is a petition of right alleging, in two counts, promises made on behalf of the Queen, and breaches of those promises, to which the Attorney-General demurs.

Several objections are made in the points delivered as to the form of the counts, and the absence of sufficient allegations that those who made the promises had authority to contract on the behalf of Her Majesty; some of which, especially as applied to the second count, might probably have forced the suppliant to amend, but the Attorney-General, on the argument, declined to press any objection which could be cured by an amendment;

and the question argued before us was that concisely and properly stated in the first and second points of argument delivered, viz.: That a petition of right will not lie for any other object than specific chattels or land, and that it will not lie for breach of contract, nor to recover money claimed either by way of debt or damages.

We leave it for future discussion to determine who have authority to make contracts on behalf of Her Majesty, and whether the contracts on which the suppliant proceeds were in fact made by any one on behalf of Her Majesty, and if so made, whether they were made within the scope of that person's authority. On these points we express no opinion. Contracts can be made on behalf of Her Majesty with subjects, and the Attorney-General, suing on her behalf, can enforce those contracts against the subject; and if the subject has no means of enforcing the contract on his part, there is certainly a want of reciprocity in such cases. But it is quite settled that on account of her dignity no action can be brought against the Queen; the redress, if any, must be by petition of right, which is now regulated by 23 & 24 Viet. c. 34. If the suppliant ultimately recovers, he obtains, under sect. 9, a judgment of the Court that he is entitled to such relief as the Court shall think just. And this form of judgment would be applicable to the case in which it appeared to the Court that the plaintiff was entitled to be paid damages for the non-fulfilment of a contract.

It appears that at the time of the passing of the Act there was a general impression that a petition of right was maintainable [* 34] for a debt due or a breach of contract by the Crown: the opinion to that effect expressed in Lord SOMERS' argument in the *Bankers' Case*, 14 How. St. Tr. at p. 39 (to which more particular reference will presently be made), had been adopted by Chief Baron Comyns, 1 Com. Dig. Prerogative D. 78, and by Sergeant Manning, in his treatise on the Practice of the Court of Exchequer, where he says, at page 84, that, "Chattels personal, debts, or unliquidated damages, may be recovered under it;" and it is well known that the case, by which attention was particularly directed to the unsatisfactory nature of the procedure, and which led to the passing of the Act (*vide* letter of Mr. Archibald to Sir W. Bovill) was the case of *Von Prantznies v. Reg* (2 De G. & J.), in which a petition of right had been presented in the old form upon a contract for the supply of provisions to the British fleet, in which it

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never appears to have occurred to the then Attorney-General, Sir R. Bethell, to question the right of this suppliant to sue by petition for breach of contract. Indeed, the framers of the Act appear to have considered its chief utility to consist in the applicability of its improved procedure to petitions on contracts between subjects and the various public departments of the government, so vastly on the increase in recent years, both in numbers and importance; whilst petitions of right in respect of specific lands or chattels must for the future be exceedingly rare.

But the 7th section of the Act expressly provides that “nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act.”

We are therefore called upon to determine the correctness of the general impression referred to, and whether before that statute a petition of right lay in respect of the non-fulfilment of a contract made by the authorised agent of the sovereign.

There is no statute that gives any such right, which, if it exists, does so at common law; and unfortunately the authorities to which we must have recourse are many of them antiquated and connected with forms of procedure with which no one now alive is familiar, and which we now approach with diffidence, as they may be misapprehended by us.

The argument against the petition of right lying in such a case * is, we think, entirely grounded on the absence of [* 35] ancient precedents. And that is undoubtedly a strong argument. All the entries in the ordinary Courts that have been brought to our notice are (with the exception of *Bankers' Case*, 14 How. St. Tr. 1, and *Wroth's Case*, Plow. 452, on which it proceeded, as to which we shall observe presently) entries of petitions in the nature of a real action to recover freehold land or a freehold rent issuing out of land; and in all the judgment is that of “*amoveas manus*.” And in *Wroth's Case* and the *Bankers' Case*, in which the judgment was different, the annuity recovered was a freehold annuity. It is too much to say that all the entries existing must have been of this nature; a search in the Petty Bag, where the records of these proceedings are kept, might possibly be rewarded by finding some in which there was a judgment in respect of a debt due from or a covenant made on behalf of the Crown. But none such have been produced; and the inferences sought to be deduced

from the absence of precedents are, either that in the early times, when the remedy by petition of right was formed, it was confined to cases in which the freehold was concerned, that being the only interest then of sufficient consequence to lead to the framing of a remedy; or that from respect to the King the remedy was confined to cases in which redress could be granted by an order to the King's officers to withdraw; and did not extend to cases in which, unless the King chose to pay, there could be no effectual relief unless the King's treasure or lands and chattels were taken in execution; and that it could not be supposed that a judgment would be given which could not be enforced.

We must observe, as to this last argument, that the moral effect of such a judgment, though it could not be enforced, must at all times have been great, and, without adopting the whole of the polite fiction of the law which, as stated by Blackstone, 2 Com. p. 225, presumes that to know of any injury and to redress it are inseparable in the royal breast, we may say that at all times the refusal of the Crown to pay its just debts was much more likely to be based on a sincere or pretended denial on the part of the Crown's advisers of the justice of the debts than on a bare-
[* 36] faced avowal of an intention to avail themselves of the power to refrain from doing right.

But we think that, in at least one important branch of the law, there is sufficient authority that a petition of right lies where the judgment could not have amounted to more than a declaration of the title to redress, leaving it to the Crown to give that redress afterwards.

In grants of real estates in the old times there was generally a warranty or covenant real by the donor to the donee. And if the donee was sued in a writ of right he might vouch his warrantor, who was then bound to defend the action. If judgment went against the vouchee the demandant recovered the land, and the tenant had judgment against the vouchee for recompense in value for the lands he lost. If the donee was deprived of the lands in a possessory action where voucher was not permitted, his remedy against the donor who had warranted the title was by *warrantia charta*: see 1 Fitz-Herbert de Naturâ Brevium, p. 134. But in cases where the King had granted lands with a warranty, it is declared by the Statute de Bigamis, 4 Edw. I. c. 1, that, where the tenant prayed aid of or vouched the King, the suit should be stayed

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until a writ of *procedendo* was awarded. This writ of *procedendo*, Lord Coke (2 Inst. p. 269) says, is a writ which the King *ex merito justitie* ought to grant.

No records have been brought to our notice showing the mode in which proceedings were taken in Chancery to obtain the writ of *procedendo*, though the cases in which the question must have risen are very numerous: see the title "Aide de Roy," in Fitz-Herbert's Abridgment; but one may suppose them to have been much in the nature of those in Chancery in a petition of right. When the *procedendo* was awarded, if the tenant could make no defence against the demandant, he would, where the grant of the Crown contained a warranty, lose the land, and have the same right against the Crown to recompense in value which he would have had against his vouchee, if a subject; but he would not have the same remedy. In such a case he could, however, sue for recompense in value by petition of right. This is proved by the case of *Earl of Warwick v. Duchess Dowager of Clarence*, Year Book, 9 Hen. VI. Pasch. pl. 7, folio 3. * There the Earl, [* 37] having brought *formedon* against the Duchess, she pleaded that she held the land for life, the reversion in the King, and prayed *aide*. She had not in her plea alleged that she held by a grant from the Crown in which there was a warranty, and it appears, from the report of the case in Hilary Term (6 Hen. VI. pl. 11, folio 25), that this was done advisedly, the Duchess's counsel not being then prepared to make profert of the original grant to her from the Crown; and, on that objection being made, amending their plea. A writ of *procedendo* having been awarded, the tenant vouched the Earl of Somerset, and it was objected that the Duchess had already got a right to a recompense in value by petition of right, in consequence of her voucher of the King, and, if she was permitted to vouch another, might have double recompense in value. Paston, who was then a Judge, points out that the *aide* prayer in this case was, or, for all that appeared on the record, might have been only on account of the feebleness of her estate, and not "with the intent to have value in the nature of voucher;" and the clerks being appealed to, certified that the established mode of pleading was "that in case the King grant to a man in fee with a warranty, or if he grant a recompense, and the tenant be impleaded and prays *Aide de Roi*, and this is in the nature of a voucher, then the special matter must be entered, or otherwise he

shall have no advantage to have the value by petition of right," &c. "*Diversitas bona*," says the reporter.

The Earl's counsel then counterpleaded that the King's father, Henry V., was seised in fee, and by his letters patent granted the land to the Duchess for life, and then died, and the reversion descended to the now King; and so by her *aide* prayer she had value by petition, and demanded judgment if she could, after that, have voucher. The counterplea is, however, as we understand the case, held bad on the ground that the tenant had an option whether to vouch the King or not, and had lost it; "for it is the folly of the tenant who vouched not when he prays *aide*." The importance of this case is, that it shows that then it was so well established that a petition of right lay in the nature of voucher or *warrantia chartæ* as to have given rise to a settled mode of pleading. On such a petition the judgment could not have been an *amovias manus*, but must have been either a dry judgment [* 38] that the suppliant had a right to recompense in value, or one giving an execution against the land of the King. Should the present case be taken into the Court of Appeal, it will be desirable to search the records to see what was the form of judgment in a petition of right in the nature of voucher.

And as to the other objection that the petition of right was only in cases where the freehold was concerned, there is the *dictum* which has been so often cited from the Year Book, 34 Hen. VI. Trinity, pl. 18, f. 51, in the case of *Rex v. William Hooce*, which, though only a *dictum*, has been adopted by Stanford.¹ There, in the course of arguing, Wangford says: "You cannot have a petition of right unless in respect of land. *Quod fuit negatum per omnes justiciarios*, who said that in many cases a man shall sue by petition to have back his goods and chattels." Against this is to be put the *dictum* in 1 Hen. VII. folio 3, pl. 3, not in any judicial proceeding, but at a meeting of all the Judges, to advise what amendments in the law should be proposed in Parliament. Amongst others, an amendment in the law as to traverse of office seems to have been discussed, in the course of which Catesby says that "petition at common law lies not, unless of a freehold at least, to which Hussey assented." Of the two *dicta* it seems to us that the opinion expressed, though unnecessarily, in a judicial proceeding is entitled to most weight. The entries in

¹ Stanford's Exposition of the King's Prerogative, ch. 22, p. 76.

the Rotula Parliamenti show that in the reigns of our early Kings petitions relating to almost everything were brought before the King in Parliament. Lord SOMERS, in the *Bankers' Case*, 14 How. St. Tr. 1, treats it as clear that the various petitions he cites from Ryley were petitions of right, whilst Lord HOLT seems to think them petitions of complaint. Lord Coke, in the 4 Inst. 11, says of petitions in Parliament, "some be of right, some of grace, and some mixt of both."

No one who looks at the rolls as published by the record commissioners, can fail to see that very many of the petitions in the times of Edward I. and Edward II. were not in the nature of suits at all, whilst many look very like suits. It seems to have been in those times unsettled whether Parliament was not a Court of original jurisdiction; later, it was settled that it was not.

* We should be sorry if obliged to form an opinion on so [*39] obscure a matter as a ground for our decision, especially when such great authorities have differed upon it. And we think it is not necessary so to do. For, in our opinion, the reasons given by Lord HOLT in favour of the judgment which was ultimately adopted by the House of Lords, as well as the reasons given by Lord SOMERS for reversing it, both lead to the conclusion that a petition of right lies in such a case as the present.

As our judgment proceeds mainly on the authority of the *Bankers' Case*, we think it right to state that case somewhat at length. Charles II. had, by letters patent under the Great Seal, granted to the bankers who had been deprived of their money by the shutting of the Exchequer, and to their creditors, annuities in fee, at the rate of six per cent on the moneys thus detained. These annuities were charged on the hereditary revenue of the excise. No pains had been spared to make the letters patent as binding as possible. They contained *inter alia* a covenant from the King for himself, his heirs, and successors, under the Great Seal that due payment should be made, and that if there was any defect in these letters patent the King, his heirs, and successors, would make a further grant; and the treasurers, &c., were commanded to give to the patentees tallies, and to pay them. The annuities were paid for four years, and then the further payment ceased. During the reigns of Charles II. and James II., the bankers took no steps at law to enforce their claims, but in the first year of William and Mary (1689), when, as Lord SOMERS

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suggests, it had become safe to sue the Crown, they commenced proceedings. If, under a petition of right, they could only have obtained a bare declaration of their right to be paid, then they would have got little more than they had already, inasmuch as the letters patent already contained under the Great Seal as strong a declaration of the patentees' rights as could be devised. And in *Wroth's Case*, Plowd. 452, they found a precedent in which, on a petition to the Barons of the Exchequer, judgment had been given against the Crown, that the letters patent creating

the annuity should be enrolled, and execution in the shape [*40] of a writ, commanding the treasurers and chamberlains * of

the Exchequer to pay the annuity and its arrears. This precedent the patentees in the *Bankers' Case* followed. The Attorney-General demurred to their petition. The majority of the Exchequer gave judgment against the Crown in the same form as in *Wroth's Case*. Then error was brought before the LORD KEEPER, assisted by the advice of the Justices of either bench. By this time, TREBY, who, as Attorney-General, had demurred and brought the writ of error, had become CHIEF JUSTICE of the Common Pleas, and SOMERS, who, as Solicitor General had argued for the Crown in the Exchequer, had become LORD KEEPER. And the LORD KEEPER, with the concurrence of TREBY, CHIEF JUSTICE of the Common Pleas, and against the opinion of HOLT, CHIEF JUSTICE of the Queen's Bench, and the six puisne Justices, reversed the judgment in the Exchequer. The modern etiquette, by which a Judge who has been counsel in a cause abstains, if possible, from taking any part in the judgment on it, seems not then to have been thought of, and no comment seems to have been made at the time on what would now be the subject of much remark. The judgment of the Barons below, and the arguments of the six puisne Judges on the appeal have nowhere been preserved. There is in 5 Modern Rep. at pp. 46, 53, a very imperfect note of TREBY's argument delivered in Trinity Term, 7 Will. III. (June, 1695), and of HOLT's argument delivered in Michaelmas Term, 7 Will. III. (November, 1695), of which there is a fuller, though still an imperfect report, in Skinner's Reports, p. 601. In parts it is a reply upon TREBY's argument. Lord SOMERS took several months to prepare a very elaborate judgment, which he delivered in Trinity Term, 8 Will. III. (June, 1696). This was published at the time under the title of Lord SOMERS' argument,

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and is reprinted in the fourteenth volume of the State Trials, p. 39. It is avowedly a reply upon HOLT. The judgment was taken by appeal to the House of Lords, and there reversed, and the judgment of the Exchequer affirmed. HOLT had there an opportunity to answer Lord SOMERS, of which he probably availed himself; but, as at that time the publication of what passed in the House of Lords, even in a judicial proceeding, was strictly prohibited, there is no report now extant of what passed.

After all, the execution against the treasurer and [*41] chamberlain seemed to have proved unproductive, and (not much to the honour of the government), the bankers were obliged to compromise by accepting 10s. in the pound, secured by statute 12 & 13 Will. III. c. 12, s. 15. We are at present only concerned with that part of the arguments in the *Bankers' Case* which bears on the question whether the patentees had a remedy by petition of right.

TREBY, Ch. J., expresses his opinion to be that the letters patent of Charles II. bound the hereditary excise in the hands of the King's successors, and consequently that the patentees had a right to be paid, and as may be inferred from what HOLT says in answering him, that they might by petition of right have that right declared, for which he seems to have cited *Everle's Case*, Ryley's Pl. Parl. 251 (33 Edw. I.), 1 Rot. Parl. 164, No. 52. He seems to have denied that the Barons had any original jurisdiction in such a case, or could interfere, unless the case was sent to them by the Crown on petition of right; but he seems mainly to have argued that though there was a right in the creditors of the Crown, they had no remedy at law to enforce that right. "I take it," he says, "that the treasurer may, if he pleased, pay these annuities to the petitioners, but whether he will do it or not is left to his conscience and discretion; but he cannot be compelled to it but by authority of Parliament." 5 Mod. at pp. 46, 48.

HOLT, Ch. J., after giving his reasons for holding that the letters patent bound the King's successors, proceeds to discuss the question of the remedy (Skin. at p. 608): As to the remedy, he held also that the patentee had taken a proper remedy; he said that all his Brothers had agreed that he had a legal right, and therefore had a legal remedy, and it is vain to have one without the other, and he said first that *monstrans de droit* and petition of right were the remedies in such case at common law, and the party in this

case is not put to his petition of right. A petition of right is not necessary, though if he will admit himself out of possession he might have a petition of right. He then proceeds to argue that the petition of right was not necessary because the patentees' title already appeared on record.

As to *Everle's Case*, he seems to admit that there might [* 42] in * that case have been a petition of right originating in

Parliament, but maintains that if it had been a petition of right, the King would have indorsed it, "Let right be done," and sent it to Chancery. As it was, he treats it as a petition of complaint, and as if the answer was no more than referring the petitioner to what HOLT considered his common law remedy by *monstrans de droit* in the Exchequer. All this is disputed by Lord SOMERS. But it is to be observed that the difference between them was as to the question whether there was a remedy by petition to the Barons of the Exchequer. The whole tenor of HOLT's reasoning is, that in any case where there was a legal right against the Crown there must be a legal remedy, and one which could be made effectual. He expressly says that a petition of right was a remedy, but not the only remedy, as he maintained, where the grant was by letters patent under the Great Seal.

Certainly there is nothing to indicate that in HOLT's opinion there was not, in the case of a Crown debt, even the imperfect remedy of a petition of right. Lord SOMERS' very elaborate argument is entirely directed to establishing that there was no power in the Barons of the Exchequer to order the treasurer and chamberlains to make these payments; and as a step, and an important step, in his reasoning, he sets himself to prove that there was a remedy by petition of right which was, as he maintained, the only remedy. He denies HOLT's position that *monstrans de droit* was at common law. And he says (14 How. St. Tr. at p. 84), "Indeed I take it to be generally true, that in all cases where the subject is in the nature of a plaintiff to recover anything from the King, his only remedy at common law is to sue by petition to the person of the King. I say where the subject comes as a plaintiff. For, as I said before, when on a title found for the King by office, the subject comes in to traverse the King's title, or to show his own right, he comes in in the nature of a defendant; and is admitted to interplead in the case with the King in defence of his title, which otherwise would be defeated by finding the office. And to

No. 2. — *Thomas v. Reg.*, L. B. 10 Q. B. 42, 43.

show that this was so, I would take notice of several instances. That in the case of debts owing by the Crown, the subjects' remedy was by petition appears by *Aynesham's Case*, Ryley's Pl. Parl. 251, which is a petition for £19 due for work done at *Carnarvon." And he cites many other entries in Parlia- [*43] ment from Ryley.

Whether Lord SOMERS was right or not in thinking that the entries in Ryley are petitions of right, there can be no question that he here expresses a distinct and considered judgment that a petition of right would lie against the Crown for a simple contract debt, such as that for wages. And unless we overrule this judgment of his, which is not opposed to HOLT's reasoning, and cannot therefore be considered as necessarily overruled by the House of Lords, we must in this case give judgment for the suppliant, and we do not find that this opinion of Lord SOMERS has been questioned since, but rather the contrary.

In Comyns' Digest, Prerogative, D. 78, it is said that petition lies if the King does not pay a debt, wages, &c.: citing Lord SOMERS' arg. 85; and Chief Baron Comyns expresses no doubt as to the soundness of the doctrine thus cited by him. It appears in *Macbeth v. Haldeman*, 1 T. R. at p. 178, that Lord THURLOW and BULLER, J. (both *obiter*, it is true), expressed an opinion that a petition of right lay against the Crown on a contract; and a similar opinion seems to have been expressed by the Barons of the Exchequer in *Oldham v. Lords of the Treasury*, 6 Sim. 220, and in *Baron de Bode's Case*, 8 Q. B. 274, in which the point was raised, though not decided. Lord DEXMAN declares "an unconquerable repugnance to the suggestion that the door ought to be closed against all redress and remedy," a doctrine much resembling what Lord SOMERS calls Lord HOLT's "popular opinion," that if there be a right there must be a remedy. In *Lord Canterbury v. Attorney-General*, 1 Phill. 306, it was decided that the sovereign could not be sued by petition of right for negligence; and in *Tobin v. Reg.*, 16 Com. B. (N. S.), 310, 33 L. J. (C. P.) 199, that the sovereign could not be sued in petition of right for a wrong. But in neither case was any opinion expressed that a petition of right will not lie for a contract, ERLE, Ch. J., expressly saying (16 Com. B. (N. S.) at p. 355), that "claims founded on contracts and grants made on behalf of the Crown are within a class legally distinct from wrongs;" and in *Feather v. Reg.*, 6 B. & S. 294, 35 L. J.

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Q. B. 200, it is assumed in the judgment that it does lie
 [* 44] “where the claim *arises out of a contract, as for goods
 supplied to the Crown on the public service.”

We think, therefore, that we are bound by the *Bankers' Case*, 14
 How. St. Tr. 1, to hold that the judgment on this demurrer should
 be for the suppliant. *Judgment for the suppliant.*

**Windsor and Annapolis Railway Company v. Reg. and the Western
 Counties Railway Company.**

(AND CROSS APPEAL BY THE QUEEN. ON APPEAL FROM THE
 SUPREME COURT OF CANADA.)

11 App. Cas. 607-618 (S. C. 55 L. J. P. C. 41; 55 L. T. 271).

[607] *Petition of Right. — Damages for Breach of Contract by the Crown.*

It is settled law that a petition of right will lie for damages resulting from
 a breach of contract by the Crown.

Thomas v. Reg. (L. R. 10 Q. B. 31) and *Feather v. Reg.* (6 B. & S. 293)
 approved.

It is immaterial whether the breach is occasioned by the acts or by the
 omissions of the Crown officials.

Appeal and cross appeal from a decree of the Supreme Court of
 Canada (Feb. 16, 1885) reversing a decree of the Exchequer Court
 (May 18, 1883).

The facts are stated in the judgment of their Lordships (Lord
 WATSON, Lord HALSBURY, Lord HOBHOUSE, Sir BARNES PEACOCK,
 Sir MONTAGUE SMITH, and Sir RICHARD COUCH).

[610] Lord WATSON:—

The government of Canada, by an agreement dated the
 22nd of September, 1871, undertook to give the appellant
 [* 611] company *the exclusive use of the Windsor Branch Rail-
 way, and also running powers over the trunk line, from
 Windsor Junction to Halifax, for the term of twenty-one years,
 from the 1st of January, 1872. The appellant company, in pur-
 suance of that agreement, entered upon and worked the Windsor
 Branch Railway until the 1st of August, 1877, when Mr. Brydges,
 the Government Superintendent of Railways, took possession of the
 line, and put an end to the occupation of the company. On the
 24th of September, 1877, the same official gave possession of
 the line to the Western Counties Railway Company, under an

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arrangement, the terms of which are to be found in Schedules A and B of the Act of the Dominion Parliament, 37 Vict. c. 16.

The appellant company, on the 10th of October, 1877, filed a bill, on the equity side of the Supreme Court of Nova Scotia, against the Western Counties Railway Company, in which they sought to obtain a declaration of their rights under the agreement of September, 1871, to recover possession of the Windsor Branch, and to have an account taken of the receipts of the defendant company, from freight and passenger traffic. On the 19th of September, 1878, the appellant company presented a petition of right to the Exchequer Court of Canada, under the provisions of the Dominion Act, 39 Vict. c. 27, in which they humbly prayed that the agreement of 1871 should be specifically performed, and also "that the sum of £150,000 sterling, or such sum as may be reasonable, may be paid to your suppliants in compensation and by way of damages for the injuries and losses which have been occasioned to them by the breach and failure of Her Majesty's government of Canada to perform the said agreement of the 22nd of September, 1871."

In the equity suit, Mr. Justice RITCHIE, on the 1st of March, 1880, decided that the plaintiffs were "entitled to the judgment of the Court in their favour, with costs." That decision was affirmed by the Supreme Court of Nova Scotia, on the 6th of April, 1881; and on appeal to this board, the judgments of both Courts below were affirmed, with costs, on the 22nd of February, 1882. Their Lordships held that the agreement of the 22nd of September, 1871, was valid and subsisting; and that the rights of the Windsor and Annapolis Railway Company under *that [* 612] agreement were not affected by the Canadian Act, 37 Vict. c. 16.

During the dependence of these proceedings the government of Canada put an end to their arrangement with the Western Counties Railway Company, and, on the 1st of December, 1879, they allowed the appellant company to resume possession of the Windsor Branch, and to exercise running powers over the trunk line, but that without prejudice to the rights or liabilities of Her Majesty, or the appellant company, except in so far as the question of damages might be thereby affected.

Her Majesty's Attorney-General for the Dominion of Canada appeared in the petition of right, and lodged a statement in defence

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on behalf of Her Majesty, on the 18th of October, 1880, but no further proceedings were taken in the cause until the judgment of this board had been given in the equity suit. On the 18th of May, 1883, Mr. Justice GWYNNE decided that damages were not, in the circumstances of the case, recoverable from Her Majesty, and dismissed the petition with costs, "leaving the suppliants to pursue their remedy for such compensation against the Western Counties Railway Company, under their judgment already recovered against that company." A motion for a rule to show cause why the judgment of Mr. Justice GWYNNE should not be set aside was refused by the Court of Exchequer on the 26th of June, 1883. Upon an appeal against that decision to the Supreme Court of Canada, Sir W. J. RITCHIE, Ch. J., and TASCHEREAU, J., held that a petition of right lay against the Crown, but that the damages recoverable must be limited to the period of the Crown's possession of the Windsor Branch from the 1st of August to the 24th of September, 1877. These learned Judges were of opinion that the appellant company, by their proceedings in equity against the Western Counties Railway Company, had elected to take that company as their debtors for all claims of damage arising after the 24th of September, 1877, and were consequently barred from preferring these claims against the Crown. FOURNIER and HENRY, J.J., whilst agreeing that the petition of right lay, held that the Crown was liable for damages suffered by the appellant company after its possession had ceased. GWYNNE, J., adhered to his former [* 613] decision, and STRONG, J., concurred *with him. The

Supreme Court, accordingly, on the 16th of February, 1885, reversed the judgment of the Court below, and ordered and adjudged that the suppliants are entitled to recover from Her Majesty the Queen the profits of the Crown from the Windsor Branch Railway from the 1st of August to the 24th of September, 1877, which they fixed at the sum of \$9589.07.

The principal appeal from that judgment is taken by the appellants, the Windsor and Annapolis Railway Company, who object to it, in so far as it excludes their claim of damages after the 24th of September, 1877. The respondent, Her Majesty's Attorney-General for the Dominion of Canada, has brought a cross appeal, in which he seeks to have the judgment of the Supreme Court set aside, and to have the judgments of Mr. Justice GWYNNE and of the Court of Exchequer restored.

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The respondent has not, in the Courts below, or at their Lordships' bar, impugned the decision of this board in the equity suit between the appellant company and the Western Counties Railway Company. He has conceded that the appellant company have still the right to possess and use the Windsor Branch line, under the agreement of 1871; and, seeing that the company was restored to possession in the year 1879, the Courts below have not thought it necessary to dispose of those parts of the prayer of the petition of right which relate to performance of the agreement of September, 1871.

Their Lordships are of opinion that it must now be regarded as settled law that, whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown. Sect. 8 of the Canadian Petition of Right Act (39 Vict. c. 27, Dom. Parlt.) contemplates that damages may be recoverable from the Crown by means of such a petition; and the reasons assigned by Lord BLACKBURN for the decision of the Court of Queen's Bench in *Thomas v. Reg.*, L. R. 10 Q. B. 31 (p. 202, *ante*), appear to their Lordships necessarily to lead to the conclusion that damages arising from breach of contract are so recoverable. A suit for damages, in respect of the violation of contract, is as much an action upon the contract *as a suit for performance; it is the [* 614] only available means of enforcing the contract in cases where, through the act or omission of one of the contracting parties, specific performance has become impossible. In *Tobin v. Reg.*, 16 C. B. (N. S.) 355, Chief Justice ERLE, whilst affirming the doctrine that the Sovereign cannot be sued in a petition of right, for a wrong done by the executive, took care to explain that "claims founded on contracts and grants made on behalf of the Crown are within a class legally distinct from wrongs."

It was argued for the respondent that in *Thomas v. Reg.*, the claim of the suppliant was not for damages, but for a pecuniary consideration alleged to have been due in terms of the contract; and consequently that it was unnecessary for the Court to decide anything as to the liability of the Crown for unliquidated damages resulting from breach of contract. But Lord BLACKBURN, in that case, deals with the suppliant's petition as alleging certain breaches of promises made to the suppliant on behalf of the Queen; and his reasoning appears to this board to be quite as

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applicable to a claim of unliquidated damages for breach of contract, as to a claim for the contract price. Lord BLACKBURN rests the judgment mainly upon the *Bankers' Case*, 14 How. St. Tr. 1, which was a suit for annuities granted by letters patent under the Great Seal; but his Lordship at the same time points out that, from the time of Lord SOMERS, there had been repeated expressions of opinion by eminent Judges in favour of the view that a petition of right lay against the Crown on a contract. It is unnecessary to cite these opinions, which are all collected in *Thomas v. Reg.* Their Lordships may, however, refer to the accurate exposition of the law given by the late COCKBURN, Ch. J., in *Feather v. Reg.*, 6 B. & S. 293: "We think it right to state that we see no reason for dissenting from the conclusion arrived at by the Common Pleas in *Tobin v. Reg.*, 16 C. B. (N. S.) 310, 33 L. J. C. P. 199 (p. 185, *ante*). We concur with that Court in thinking that the only cases in which the petition of right is open to the subject are, where the land, or goods, or money of a subject have found their way [* 615] into the * possession of the Crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money, or when a claim arises out of a contract, as for goods supplied to the Crown or to the public service." Their Lordships desire to add, that upon this branch of the case they agree with the reasoning of RITCHIE, Ch. J., and the able judgment of Mr. Justice FOURNIER.

It was argued for the respondents that no breach of the agreement of 1871 was committed by the Crown, inasmuch as the taking possession of the Windsor Branch Railway on the 1st of August, 1877, was simply the tortious act of Mr. Brydges. The argument fails because it has no foundation in fact. The respondent in his statement of defence alleges that, on or about the 25th of July, 1877, the government of Canada, having completed arrangements for transferring the line to the Western Counties Railway Company, a minute was passed by the Governor-General in Council directing that the arrangements then existing with the appellant company should be terminated on the 1st of August, 1877: that the Minister of Public Works was directed to resume possession on that day; and that, "in pursuance of the said minute of Council and of the said Act of 1874," the officers of Her Majesty dispossessed the appellant company and gave possession of the line to the Western Counties Railway Company. It

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is plain, therefore, that Mr. Brydges acted with the full authority of the government, and merely carried out their instructions, which were issued in the belief that it was within their legal right to put an end to their agreement with the appellant company.

Another argument submitted on behalf of the respondent was to the effect that the Crown is only liable in respect of breaches of contract occasioned by the omissions of Crown officials, and is not liable in respect of breaches due to their positive acts, even when these acts are done under direct authority from the Crown. Upon this point it is sufficient to say that, in the opinion of their Lordships, there is neither authority nor principle for recognising any such distinction.

It was also argued for the respondent that the Crown cannot be held liable as for breach of contract, inasmuch as all the acts *of the government of Canada in putting an end [* 616] to the possession of the appellant company, were done (to use the language of Mr. Justice STRONG) "expressly with the intention of acting in pursuance of the statute of 1874, and for the purpose of carrying out the provisions of that statute, a duty which Parliament had imposed on the executive government." If the effect of the Canadian Act of 1874 (37 Vict. c. 16) had been to make it the imperative duty of the government to terminate their agreement with the appellants, and to give possession of the Windsor Branch to the Western Counties Railway Company, the Crown would have incurred no liability to the appellants by performing that statutory duty. But the decision of this board in the previous suit was given in favour of the present appellants, on the very ground that the Act of 1874 did not affect the validity or subsistence of the agreement of September, 1871, and imposed no obligation on the government to interfere with the appellants' possession of the Windsor Branch Railway, or to transfer it to the Western Counties Railway Company.

The only matters remaining for consideration are the extent to which the Crown is liable for damages, and the amount of damages which ought to be awarded to the appellants. Their Lordships are of opinion that, on the 1st of August, 1871, when they were ousted by the act of the Crown, there arose to the appellants a claim of damages, for loss of possession, during the

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whole remainder of the term specified in the agreement of 1871; and that their subsequent restoration, in December, 1879, had merely the effect of reducing the amount of that claim. They are unable to assent to the view taken by Mr. Justice HENRY, who was of opinion that damages must be restricted to the period between the 1st of August, 1877, and the 19th of September, 1878, the date when the petition of right was presented.

It has been argued, however, for the respondent, and the Supreme Court of Canada has, by a majority, given effect to the argument, that the appellants can only recover from the Crown such damages as were incurred by them whilst the Crown was in actual possession of the Windsor Branch Railway. It is said that the appellants are estopped from preferring any claim

against the Crown, after the 24th of September, 1877, by [*617] reason *of their having elected to accept the Western

Counties Railway Company as their sole debtors for damages accruing subsequently to that date. In the opinion of their Lordships, the plea thus advanced by the respondent is without foundation either in fact or law, and must therefore be rejected.

The respondents' statement in defence contains no plea of estoppel, and no allegation of fact, upon which such a plea could be founded. The argument has been based upon the print of proceedings in the equity suit, which was tendered by the respondent, at the trial of the present cause before Mr. Justice GWYNNE, and received *de bene esse*. Even if it were competent in these circumstances to entertain the plea of estoppel, their Lordships would be of opinion that no case of election has been made out. Both suits were depending long before an operative judgment was pronounced in either of them. In the suit directed against the Western Counties Railway Company, which prayed, *inter alia*, for an account of profits, although the appellants were found to be entitled to the judgment of the Court in their favour, there has been no order directing an account to be taken, none has been taken, and no decree has been made ordaining the defendant company to make a money payment to the appellants. Had there been such a decree, any payment made under it by the Western Counties Railway Company would have operated in satisfaction *pro tanto* of the liability of the Crown; it could have had no other effect.

Their Lordships have accordingly come to the conclusion that the appellants are entitled to judgment for the whole damage sustained by them from the 1st of August, 1877, to the 1st of December, 1879. The evidence as to the amount of damage lies within a very narrow compass; it is not contradictory, and involves no question as to the credibility of witnesses. In these circumstances, their Lordships have thought it better, in order to obviate the necessity of further litigation, to determine the amount of damages themselves, and they have accordingly assessed the same at \$115,000.

Their Lordships will humbly advise Her Majesty that the cross appeal should be dismissed and the judgment appealed from in the original appeal, in so far as it orders and adjudges "that the *appellants, the suppliants, are entitled to [*618] recover from the respondent, Her Majesty the Queen, the profits of the Crown from the Windsor Branch Railway from the 1st day of August, 1877, to the 24th day of September, 1877, both inclusive, which have been fixed and determined at the sum of \$9589.07, being portion of their relief sought by the petition of right," ought to be reversed; and that *quoad ultra* the said judgment ought to be affirmed, subject to the declaration that the appellants, the suppliants, are entitled to receive from Her Majesty the Queen the sum of one hundred and fifteen thousand dollars (\$115,000) as the damages suffered by them by reason of their having been deprived of the possession and use of the Windsor Branch Railway from the 1st of August, 1877, to the 1st of December, 1879. Their Lordships also find that the appellant company are entitled to receive the costs incurred by them in the principal and cross appeals.

ENGLISH NOTES.

A further point was decided in the case of *Thomas v. Reg.* on the 25th of November, 1874 (reported L. R. 10 Q. B. 44), namely, that the right to discovery of documents under the 50th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), does not extend to the proceedings under the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), so as to give the suppliant any right to discovery of documents.

The topic of petitions of right has already been fully treated in the notes to No. 18 of "*Action*," 1 R. C. 815 *et seq.*, and under No.

No. 1. — The Maria, 1 Wm. Robinson, 95. — Rule.

10 of “Crown,” 8 R. C. 267 *et seq.* The above cases, as leading cases on petitions of right under the Act of 1860, have been considered useful to be set forth at length under this heading.

AMERICAN NOTES.

As was stated in the American note to No. 10 of “Crown,” 8 R. C. 274, there is no doctrine in America corresponding to that of the petition of right in England. The American states are not subject to suit in their own Courts or those of other states without their express consent. See 23 Am. & Eng. Encycl. of Law, 1st ed. pp. 83 *et seq.* : 1 Stimson, American Statute Law, sect. 75.

PILOTAGE.

No 1. — THE MARIA.

(1839.)

RULE.

WHERE a pilot is taken on board under compulsion of law, the ship-owner is, upon general principle, and irrespective of any express statutory exoneration, not liable for damage caused by the fault of the pilot.

The Maria.

1 Wm. Robinson, 95–111.

Compulsory Pilotage. — Immunity of Owners for Damage occasioned by Default of the Pilot.

[95] The owners of a foreign vessel proceeding up the river Tyne, with a duly licensed pilot on board, under the provisions of the Newcastle Pilot Act, *held* not to be responsible for damage occasioned by the default of such pilot.

Construction of the Act 41 Geo. III. c. 86. Under 6th section, compulsory upon masters of foreign ships to take a pilot on board.

Effect of such compulsion, that independent of the Act 5 Geo. IV. c. 55, upon general principles the owners are not responsible.

This was a cause of damage by collision, promoted by the owners of *The Websters*, a British vessel, against the Prussian ship *The Maria*.

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The Act on petition on behalf of *The Websters* set forth, "That on the 11th of May, 1839, the schooner *The Websters* was on her return voyage to Newcastle-upon-Tyne, laden with a cargo of peas; that in the forenoon of the said day, when about half flood, the said schooner was got under weigh to proceed up the river Tyne; that the tide being weak, and it being nearly a calm, with the wind light from the eastward, the schooner's boat with two hands on board was attached by a rope ahead, in order, by rowing, to assist the said schooner in her progress up the said river; that in rounding Bell Point, a brig or snow (which afterwards proved to be the foreign ship *Maria*, the vessel proceeded against) was observed in tow of a steamboat or tug coming up rapidly astern of the said schooner; and, at the same time, another vessel, also in tow of a steam tug, was observed coming down the river ahead; that the said schooner being in a proper situation or fair way, it was not necessary that she should, nor did she alter her position; that George Chapman, the master of the said schooner, hailed *The Maria*, and told the *persons on board her to [* 96] ease the steamboat and not tow into the said schooner; that when the said schooner had reached opposite Bell Point, which is situated about five miles up the said river, the said brig *Maria*, notwithstanding she was repeatedly hailed to ease the steam of her tug, came into collision with her, and ran into the starboard mainchains, and thereby did the said schooner considerable damage; that at the time of the collision the schooner was in charge of a branch river pilot on the said river Tyne; that every precaution was used in keeping the said schooner in a proper situation; that there was sufficient room for the said tug to have passed the said schooner, if sufficient precaution had been used; and that the collision in question was solely owing to the mismanagement or neglect of those on board the said brig, and not through any fault of those on board the schooner."

The reply on the part of *The Maria* denied that the accident was occasioned by the mismanagement of those on board her; on the contrary, it alleged, "That at the time the brig *Maria* came up with *The Websters*, a large ship, called *The Grafton*, was observed coming down the river, the schooner *Websters* being at such time on the larboard bow of the brig; that the foresaid ship, *The Grafton*, was coming direct towards the schooner and brig, and that her helm was ported in order to go to the southward of

 No. 1. — *The Maria*, 1 Wm. Robinson. 96–98.

The Websters, but that she did not answer her port helm, in consequence of which she ran foul of *The Websters*, and that by the violence of the blow, the schooner was forced to the northward, and driven with her starboard side across the bows of the said brig *Maria*, and that such collision arose entirely from the said [*97] barque *Grafton* not *answering her helm, and that the damage complained of in this cause was occasioned thereby," &c., &c.

It was also further set forth on the part of *The Maria*, that the brig *Maria* was a foreign vessel, and at the time of the collision was under the charge of a duly licensed pilot, taken on board under the provisions of the Newcastle Pilot Act, 41 Geo. III. c. 86, s. 6, and that in virtue of that Act, as also of the General Act, 6 Geo. IV. c. 125, s. 55, even if the damage had been occasioned by her, as alleged, the owners were not responsible in this cause.

The cause was argued on a former Court day by the Queen's Advocate on behalf of the owners of *The Websters*, who submitted :

That in point of law, under the circumstances of the case, the owners of *The Maria* were not exonerated on the ground of a pilot being on board at the time of the collision, because it was not compulsory upon the master to take such pilot on board. That upon this ground alone had the exemptions in other cases been allowed. That in the case reported in the third volume of Price's Reports, *The Attorney-General v. Case* (3 Price 302, 17 R. R. 566), which was a case under the provisions of the Liverpool Act, an Act similar in its operation with the Newcastle Act now relied on, the exemption of the owners was overruled upon this point: viz., "That although a pilot was on board at the time, it was not compulsory upon the master to have taken such pilot on board," and upon the merits of the case he also submitted that *The Maria* was in fault, and consequently that the owners were responsible.

Phillimore, *contrà*, contended on behalf of *The Maria*: —

[*98] *That with respect to the merits of the case, the accident was not the fault of *The Maria*, but of *The Grafton*, which had driven against *The Websters* and forced her across the bows of *The Maria* as pleaded in the reply to the Act on petition; and with respect to the law of the case, he submitted, that under the provision of the Newcastle Act, 41 Geo. III. c. 86, a compulsory obligation was imposed upon the master to take the pilot on board, and that consequently, by the 55th section of the 6 Geo. IV., and

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also upon the authority of the case decided in *Carruthers v. Sydebotham*, 4 M. & S. 77 (16 R. R. 392), his parties were entitled to be dismissed with costs.

Judgment. — Dr. LUSHINGTON : —

I am exceedingly glad that I have taken time to deliberate before I gave my opinion in this cause. The result of that deliberation has been to induce me to investigate with great care the cases that have been cited in the arguments of the learned counsel, and I hope that some considerable light has been thrown upon my mind with respect to the present question in consequence of that investigation.

The facts of the case lie in a narrow compass.

The collision took place when the two vessels, *The Maria* and *The Websters*, were proceeding up the river Tyne. The action is brought against *The Maria*, and it is alleged that the collision was occasioned by the neglect, misconduct, or want of seamanship of the persons on board that vessel. I should also state, that *The Maria* was in tow of a steam vessel at the time, and that *The Websters* was proceeding by the assistance of her own boat to ascend the river to the port of her destination.

The defence set up on the part of *The Maria* is * twofold. [* 99] They do not deny the fact of the collision, or impute blame to the persons on board *The Websters*; but it is contended, first, that *The Maria* is a foreign vessel having a pilot on board in compliance with the local Acts; and secondly, that the accident was occasioned by another vessel, *The Grafton*, which in coming down the river struck the larboard side of *The Websters*, and drove that vessel with her larboard side across the bows of *The Maria*.

The question, therefore, is a mixed question of law and of fact. In delivering my judgment, I shall first address myself to the question of law, and afterwards to the consideration of the facts which it may be necessary to dispose of in this case.

With respect to the law of the case, the first question is, whether *The Maria*, if the responsibility would otherwise fall upon her, can successfully plead, in exemption of the owners' liability, that she had a pilot on board, and if she can so successfully plead, another question might then arise whether the collision occurred in consequence of the want of skill or negligence of that pilot.

Now the leading principle of the Legislature in exonerating

No. 1. — *The Maria*, 1 Wm. Robinson, 99–101.

owners from any damage occasioned by their vessels having pilots on board, is this; that the masters are compellable to take such pilots on board, and the owners are not responsible for the acts of persons to whom they are thus forced to commit the management of their property, and over whom they have no control. This, I apprehend, is a rule founded on a great principle of justice and equity. It is a rule also supported by the authority of the case which has been cited, I mean the case of *The Attorney-General v. Case*, reported in the third *volume of Price's Reports (3 Price, 302, 17 R. R. 566), which it will be necessary to examine with much particularity. Now in the case referred to, the vessel doing the damage and held responsible was *The Columbus*; she was lying at anchor in the river Mersey, when she dragged her anchor and fell foul of *The Bittern*, a King's ship, and occasioned the damage in the collision.

In that case the opinion of the Court of Exchequer, pronounced by the very learned Chief Baron THOMPSON, was to this effect:—That the general Pilot Act, 52 Geo. III. c. 39, had no general operation over all pilots duly licensed throughout the kingdom, but was confined, unless where otherwise particularly expressed, to the pilots specially enumerated in the Act itself; that therefore it did not extend generally to pilots licensed under the Liverpool Act (37 Geo. III. c. 78), and that the question whether the taking of a pilot was compulsory or not, must depend upon the construction of the Liverpool Act alone. It was also further decided in that case, that the Liverpool Act did not, under the circumstances of the case, render it compulsory upon the master to take the pilot.

The Columbus was lying at anchor in the river Mersey; this is an important particular to be noticed. By the 31st and 34th sections of the Liverpool Act, it is provided, that any vessel whilst lying at anchor may require a pilot to remain on board, upon payment of five shillings per day for his services. It was purely optional, therefore, to have a pilot on board or not. What follows upon this? "That the owners of *The Columbus* were liable to the damage, because the master, in electing to take the pilot on board, took him as the servant of the owners; and by the general law owners are responsible for the *acts of their agents." There is a confusion in the report of that case which has raised much difficulty, and the report cannot be reconciled with the decision that was given upon that occasion. The

No. 1. — *The Maria*, 1 Wm. Robinson, 101, 102.

ground upon which it was decided was as I have already stated; but it never was decided that a clause requiring a pilot to be taken on board, or if not taken, the pilotage to be paid, was not compulsory.

The words of the learned Judge in delivering the opinion of the Court were these: "There is nothing here compulsory upon the master or owner to take on board a pilot whilst he is riding at anchor in the river Mersey. It is optional in him whether he will do so or not; but if he chooses to do so, he is to pay the pilot at the rate of five shillings for every day he shall attend, and no more. His obligation to take a pilot (even if the Act of the 37th is to be taken as connected with the Act of the 52 Geo. III.) is only on his proceeding to sea and refusing to take on board a pilot so licensed. There is no penalty for not taking on board a pilot whilst lying in the river Mersey, but he is entitled, if he thinks fit, to command the services of a pilot whilst so lying at anchor, paying him at the rate here specified; and it is for that accommodation that he is to pay the five shillings if he refuses to take him on board, upon the vessel proceeding to sea." The learned Judge then went on to say: "He was not compellable at the time in any way, either under the penalty of double wages or of paying even the single wages, to have any pilot on board; it was his own act to have him, and it can be only in the case of such an officer having been forced upon him without his own election that the responsibility of the owner can possibly be discharged."

* It is therefore quite clear to my mind, that the case [* 102] to which I have just adverted was rightly decided; and it is also equally clear, that it was decided simply upon the ground that when a pilot is taken on board, and it is optional for the master to have that pilot or not, the owners are responsible for his acts. But no decision was given as to what was or was not a compulsory necessity.

A question very similar was again raised in the case of *Carruthers v. Sydebotham*, 4 M. & S. 77 (16 R. R. 392). This case, I find in the last edition of Lord Tenterden's Book on Shipping, was argued and determined in the Court of King's Bench in the interval between the argument and judgment in the Exchequer. The question in *Carruthers v. Sydebotham* was upon a policy of assurance, whether the assured could recover upon the policy for

 No. 1. — *The Maria*, 1 Wm. Robinson, 102, 103.

the amount of certain goods which had been damaged by the stranding of the vessel through the mismanagement of a pilot on board duly licensed under the Liverpool Act.

The circumstances of the two cases therefore was different, but the principle to be decided was the same in both; and in arguing the case in *Carruthers v. Sydebotham*, it was much discussed whether a necessity was imposed upon the master or owner to take a pilot on board under the provisions of the Liverpool Act in conjunction with the General Act. In the judgment of the Court this point was decided in the affirmative, and the Court held that the General Act did operate upon the Liverpool Act, and that by virtue of such General Act the taking on board the pilot was compulsory.

It is observed by Lord Tenterden, in the last edition of [* 103] his Work on *Shipping, that the two cases are not easily reconcilable with each other in all that was said by the learned Judges, and the learned Lord then proceeds to remark with reference to those decisions: "It may be inferred from the two cases considered together, that where the master is bound by Act of Parliament under the penalty to place his ship in the charge of a pilot, and he does so in compliance with the provisions of such Act, the ship is not to be considered as under the management of the owners or their servants, but when it is in the election or discretion of the master to take a pilot or not, and he thinks fit to take one, the pilot so taken is to be considered as a servant of the owners. To what extent and under what particular circumstances the master is thus bound to place his vessel under the charge of a Liverpool pilot may, in many cases at least, be considered as undecided." Now is it necessary for me to decide between the conflicting opinions of such high authorities as the Court of King's Bench and the Court of Exchequer? And if it were necessary so to do, is there any express distinction between the statutes 52 Geo. III. and 6 Geo. IV.?

Some slight difference undoubtedly there is in the wording of the statutes in question, but I can find no material distinction in their effect. In forming my opinion in the present instance, my judgment must be founded upon the statute 6 Geo. IV., and especially upon the 55th section of that statute.

Now the 55th section provides in the following terms: "That no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons

 No. 1. — The Maria, 1 Wm. Robinson, 103–105.

whomsoever, for or by reason or means of any neglect, * default, incompetency, or incapacity of any licensed [* 104] pilot acting in charge of any such ship or vessel under or in pursuance of any of the provisions of this Act.” Then the question, if I have to decide it at all, is this: whether or no the pilot in this case was duly licensed and acting in charge under the provisions of the Act? And this is a point of very considerable difficulty to be determined.

If I look to the 6th section of the Act in question, I find, “It shall be lawful for the corporation of the Trinity Houses of Hull and Newcastle,” the one we are now considering, “to appoint sub-commissioners to examine pilots, and give licences to them to pilot ships and vessels into or out of any ports, harbours, or places within the limits of their jurisdiction.” Is any authority here given to the corporation of the Trinity Houses of Hull and Newcastle to grant licences, rendering a pilot so licensed a licensed pilot under the general provisions of the Act?

Again the 89th section likewise provides that the Act shall not “extend to ports in relation to which particular provision shall have been made in any particular Act or Acts of Parliament, to the pilots or pilotage, or the pilotage within the limits prescribed by any Act or Acts of Parliament relating to pilotage for such ports.” Upon these two sections of the Act, then, I doubt very much whether I could with propriety apply the 55th section of the General Act of 6 Geo. IV. to the case of a Newcastle pilot appointed under the circumstances of this case. But it is not necessary for me to determine this point upon the present occasion, for reasons to which I will presently advert; and I gladly forbear to take upon myself unnecessarily the difficult task of deciding upon the conflicting opinions * in the cases of the [* 105] *Attorney-General v. Case* and *Carruthers v. Sydebotham* to which I have already referred.

I must now, however, take another view of *Carruthers v. Sydebotham*, which bears very strongly upon the question I have to decide, and observe the difference between the circumstances of that case and the case of the *Attorney-General v. Case*. In the case of the *Attorney-General v. Case*, *The Columbus*, the vessel proceeded against, was lying at anchor. In *Carruthers v. Sydebotham*, *The Alexander* was proceeding up the river homeward bound with a pilot on board.

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Now the Liverpool Act provides for the three following cases :

1st, The case of vessels homeward bound; 2nd, of vessels outward bound; and lastly, of vessels lying at anchor; and with reference to homeward bound vessels, it is provided in the 24th section of the Act, that if the master refuses to take a pilot on board he is liable to the payment of pilotage. There is, therefore, this distinction in the two cases; that in the case of a vessel at anchor, the taking of a pilot on board is perfectly optional with the master; but in the case of a homeward bound vessel, it is enjoined upon him by the provisions of the Act, and if he refuses so to do he is rendered liable to the payment of the pilotage dues. This, in my opinion, amounts to a compulsion to take such pilot on board, and it was so held by the learned Judges by whom the case of *Carruthers v. Sydebotham* was decided. What says Mr. Justice LE BLANC? He says, "It appears that the master was compellable by law to take on board a pilot, and it was in consequence of his misconduct that the vessel was placed [* 106] *in such a situation that when the water left her she fell upon her side and thus the damage happened."

Without going further into the case, it is sufficient to observe, that Lord ELLENBOROUGH and Mr. Justice BAYLEY were of the same opinion, that the master was compelled to take a pilot on board. But it may be said, that admitting, in the case of *The Alexander*, that the taking a pilot was compulsory, does it therefore follow that the owners would be exempted from the damage done by their vessel, unless the 30th section of 52 Geo. III., or as in this case the 55th section of 6 Geo. IV., applies to give the indemnity?

Now I am of opinion, that independently of the express provisions in those statutes, the compulsory taking of a pilot does upon general principles relieve the owner from all responsibility for his acts. Observe the expression of Mr. Justice LE BLANC: "Independently of the general principle, the Pilot Act provides," &c. Although, therefore, his judgment was founded upon the opinion that the 55th section did apply to the Liverpool Act in the particular case he was deciding, he clearly recognised the general principle, and this principle is one that is recognised by common sense and justice all over the world. Supposing, then, the General Pilot Act not to apply in this case, is not the general principle alone sufficient to exonerate the owners? I think it is, and for

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this reason: upon general principle, a man is answerable for the acts of his servants, for injuries done by them to others within the scope of their employment; and why? Because he selects them, and the selection is voluntary. But if a man is compelled to employ another, the principle upon which liability depends wholly fails.

* These are nearly the words in which Lord Chief Justice EYRE laid down the principle of law respecting the responsibility of owners. If it were necessary to trace the principle further, I might refer to the case of *Nicholson v. Mouncey*, reported in 3 East, 384 (13 R. R. 501); but it is not necessary to go into the consideration of that case. I may here, however, notice that it has been said, that a contrary doctrine has been laid down by Chief Justice MANSFIELD in the case of *Bowcher v. Noidstrom*, 1 Taunt. 568 (10 R. R. 608); but on looking to the report, it is evident that the doctrine said to have been delivered by Chief Justice MANSFIELD applied to a very different case. Then what is the result upon my mind of the two important cases to which I have so fully adverted, leaving out of consideration the question of the general operation of the Pilot Act, and its applicability to pilots appointed by local authorities? It is this: I think both cases were rightly decided. The case of the *Attorney-General v. Case*, because there was no compulsion to take a pilot. That of *Carruthers v. Sydebotham*, because the taking a pilot was compulsory, and the insurers were only liable upon that ground and not otherwise. After this long, but as I conceive necessary preliminary examination of the cases and principles on which they were decided, I now come to the present case, and I shall apply the principles I have laid down to it.

If the taking a pilot on board was compulsory, and the collision was occasioned by the fault of that pilot, I shall hold the owners of *The Maria* exempt from responsibility, upon general principle, without reference to Acts of Parliament, for in that case the pilot was not their servant, and the maxim *qui facit per alium facit per se*, does not apply. If, on the contrary, the taking a pilot was voluntary, then he was the servant of the owners, and the owners are responsible, unless the General Pilot Act, which takes away responsibility, applies to a foreign vessel so circumstanced, and to cases where it is optional to take a pilot or not.

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Now *The Maria* was a foreign vessel. How came she then to take a pilot, and what obligation was there upon her so to do? For the purpose of ascertaining this point, I must look to the words of the Newcastle Act, which compel vessels proceeding up the Tyne to take a pilot on board, and in the 6th section of that Act I find, "That the owners or masters of any foreign ships or vessels resorting to or coming into or departing from the said port of Newcastle, or any of the creeks or members belonging thereto, shall, and they are hereby 'obliged' and 'required' respectively to receive, take on board, and employ in the piloting and conducting such their ships or vessels, such pilots licensed as aforesaid; and in case of their neglect or refusal to receive and employ such pilots as aforesaid, they shall severally, nevertheless, answer and pay to the said master pilots and seamen the aforesaid pilotage duties." Now does the section in question impose any compulsory duty and necessity upon the owner or master to take a pilot on board? I am most clearly of opinion that the section referred to is compulsory. If it had been enacted simply that a pilot should be taken without providing that in case a pilot was not taken, the pilotage should be paid, the master would clearly have been liable to be indicted for a misdemeanour in refusing to [* 109] take him, for every *breach of an Act of Parliament within

British jurisdiction is an indictable offence, whether committed by a foreigner or not. But assuming that all criminal proceedings are done away with by the clause enacting the pilotage to be paid, is it less compulsory upon the master to have such pilot on board? It was so urged in the argument of counsel, upon the supposition that such argument had prevailed in the case of the *Attorney-General v. Case*; but I have shown that there is a mistake in the report of that case, and that the case itself is no authority for any such position. I have also further shown, that in the case of *Carruthers v. Sydebotham* much weaker words were considered compulsory. In the Liverpool Act there are no such words as "obliged" and "required," but simply that if no pilot is taken, the pilotage shall be paid. But independent of authorities, look at the words of the Act themselves, "obliged" and "required;" they are compulsory *per se*. But is not the making the neglect to take a pilot punishable with payment of the pilotage also a compulsion upon the owners? Suppose the statute had mentioned ten times the amount of the pilotage? where would be the differ-

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ence? It would only be in the degree of the compulsion, but not in the compulsion itself. I have, therefore, no hesitation in saying, that this pilot so taken on board in obedience to the Act of Parliament was taken by compulsion, and if by compulsion, the owners are not responsible for his acts. Then what is the true description of the facts of this case? The owners of *The Websters* charge generally, that the collision took place from the fault of those on board *The Maria*. Now the fault, if fault there was, consisted either in proceeding to the northward of *The* * *Websters* or in not slackening the speed of *The Maria* by [* 110] casting off the tow rope or easing it. If the fault lay in proceeding to the northward, it was the fault of the pilot, and the owners are not responsible. If, on the other hand, the fault consisted in the not slackening *The Maria's* course, upon whom does the blame attach? Not upon the master, for the conduct of the vessel was with the pilot; and it would be a most dangerous doctrine to hold, except under most extraordinary circumstances, that the master could be justified in interfering with the pilot in his proper vocation. If the two authorities could so clash, the danger would be materially augmented, and the interests of the owners, which are now protected both by the general principles of law and specific enactments from liability for the acts of the pilot, would be most severely prejudiced. If no order was given to ease the steamer, the fault was in the pilot, not in the master; the owner, therefore, in this view of the case, would not be responsible.

It is needless to prosecute the inquiry further to the case of the steamer itself, for it is not alleged, and could not be imagined, that the steamer would not fulfil the orders of the pilot; and there is no proof of any disobedience on the part of the seamen on board the steamer. With respect to *The Grafton*, I see no occasion to consider whether the accident did or did not arise from the fault of the persons on board her; for if it did, there can be no dispute that *The Maria* is not responsible.

Assuming, therefore, that the accident was occasioned by *The Maria*, I am of opinion that, under the circumstances of this case, it was the fault of the pilot who was taken by compulsion, and that the owners are consequently not liable.

* The opinion I have thus formed in this case is founded [* 111] upon the general principles of reason and justice; that

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no one should be chargeable with the acts of another who is not an agent of his own election and choice; and I further think, that it would be contrary to all sense of equity, to say to the owners of a foreign vessel, "You shall take a pilot of our selection, of our appointment; be he drunk or sober, negligent or careful, skilful or ignorant, you shall be responsible for his conduct, unless you choose to submit to the penalty, and penalty it is, of paying the pilotage for nothing."

I therefore dismiss the owners of *The Maria* from the present suit, but without costs.

ENGLISH NOTES.

The subject of the immunity of owners for the default of a pilot employed compulsorily has already been treated under No. 28 of "Negligence," 19 R. C. 208 *et seq.*

The above case has been chosen as a leading case to exemplify the principle. And the cases cited in the case of the *General Steam Navigation Co. v. British and Colonial Steam Navigation Co.* (1869), No. 28 of "Negligence," and in the notes there, will furnish a sufficient clue to the subsequent authorities on the general question.

In *The Prins Hendrick* (1899), 68 L. J. P. D. & A. 86, a case arising out of a collision in the river Scheldt, it was held that, although pilotage is compulsory in the river Scheldt in the sense that, by Dutch law, vessels are obliged to take a pilot on board, and pay pilotage dues, the ship is not surrendered to the pilot so as to free the owners from liability for a collision caused by his negligence.

Other special points in connection with the excuse of compulsory pilotage are dealt with under Nos. 2, 3, 4, 5, 6, & 7, pp. 235 *et seq.*, *post*.

AMERICAN NOTES.

See the American notes to No. 28 of "Negligence," 19 R. C. 218, and the cases there collected, showing that in the United States, unlike England, a ship-owner is liable for damage caused by the negligence of a pilot, although the employment of the pilot is compulsory.

In *Smith v. Coudry*, 1 Howard (U. S.), 28, where a collision between American vessels occurred in an English port, it was held that the rights of the parties depended upon the provisions of the British statutes, and that consequently the master or owner of the vessel causing the injury was not answerable for damages caused by the fault of the pilot.

No. 2. — **Smith v. Steele and others**, L. R. 10 Q. B. 125, 126. — Rule.

No. 2. — **SMITH v. STEELE.**

(1875.)

RULE.

A PILOT whom ship-owners are compelled by regulations to employ does not enter into an implied contract with the ship-owners to take upon himself the risk of personal injury by the negligence of the master and crew.

Smith v. Steele and others.

L. R. 10 Q. B. 125-129 (s. c. 44 L. J. Q. B. 60; 32 L. T. 195; 23 W. R. 388).

Negligence. — Master and Servant. — Compulsory Pilotage. — Injury to [125] Pilot.

There is no implied contract between the owners of a ship and a pilot whom they are compelled to employ, that the pilot shall take upon himself the risk of injury from the negligence of the ship-owners' servants; and an action will lie by the pilot against the ship-owners for injuries caused to him, whilst acting as pilot on board their vessel, by the negligence of their servants.

Declaration by the plaintiff, as executrix of J. G. Smith, deceased, that the defendants were possessed of a certain sailing vessel and of a certain boat slung upon the same, which sailing vessel and boat were then under the care and management of certain servants of the defendants, and that J. G. Smith then was, by the consent and invitation of the defendants, and by virtue of their retainer, upon the sailing vessel for the purpose of piloting the same down the River Thames. Nevertheless, the defendants, by their servants, so carelessly, negligently, and improperly slung, suspended, and managed the boat, that, through their carelessness, negligence, and unskilful conduct, whilst J. G. Smith was upon the vessel under the circumstances and for the purpose aforesaid, the boat fell upon J. G. Smith and injured him, inasmuch that he in a few days afterwards died, &c.

Pleas 1. Not guilty; 2. That J. G. Smith was on board the * vessel in the defendants' employment as pilot, for [* 126] the purpose of piloting the vessel down the River Thames, for which he was so retained for reward payable to him, and the injury to J. G. Smith was not in any way occasioned by any act, neglect, or default of the defendants personally, but was solely

No. 2. — *Smith v. Steele and others*, L. R. 10 Q. B. 126, 127.

occasioned by the negligence of the servants of the defendants, and the servants of the defendants were persons of reasonable skill and care, and reasonably competent to sling, suspend, and manage the boat: and the servants of the defendants and J. G. Smith were engaged in one common employment with a common object, to wit, in the navigation and management of the vessel, and the injury to J. G. Smith was one of the risks incident to the employment of J. G. Smith as such pilot; and that the alleged carelessness, negligence, unskilful and improper conduct of the servants of the defendants were wholly unauthorised by the defendants.

Issue thereon.

At the trial before LUSH, J., at the Sussex Spring Assizes, 1874, the facts stated in the judgment of the Court were proved, and the jury found a verdict for the plaintiff, with leave to move to enter a verdict for the defendants, or a nonsuit.

A rule was afterwards obtained accordingly, on the ground that the defendants were not responsible for the negligence of their servants under the circumstances proved in evidence.

Jan. 12. Willis showed cause.

Thesiger, Q. C., and Wood Hill, in support of the rule.

In addition to the cases mentioned in the judgment of the Court, the following were cited: *Degg v. Midland Railway Co.*, 1 H. & N. 773, 26 L. J. Ex. 171; *General Steam Navigation Co. v. British and Colonial Navigation Co.*, L. R. 4 Ex. 238.

Cur. adv. vult.

Jan. 25. The judgment of the Court (COCKBURN, Ch. J., BLACKBURN, MELLOR, and LUSH, JJ.) was delivered by BLACKBURN, J.¹

[* 127] This is an action under Lord Campbell's * Act to recover damages in respect of the death of the plaintiff's testator, who was her husband.

At the trial before my Brother LUSH the following facts were proved: The defendants were the owners of a vessel lying in dock, about to proceed on a voyage in which the employment of a pilot was compulsory. The testator was a pilot who was engaged for that voyage. He (in compliance with what it was proved was always the practice of pilots) went on board the vessel in dock to give directions to the crew when getting the vessel out of dock.

¹ The judgment was read by MELLOR, J.

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Whilst doing so a boat, which had been negligently slung, fell on him and killed him. The defendants did not personally interfere in the matter. From the way the case comes before us on a point reserved, we must take it as a fact that the accident was occasioned by the negligence of the servants of the defendants in slinging the boat without contributory negligence on the part of the deceased. Leave was reserved to enter the verdict for the defendants or a nonsuit on the ground that the defendants were not responsible for the negligence of their servants under the circumstances proved in evidence. A rule *nisi* was obtained accordingly, against which cause was shown in this term before my LORD CHIEF JUSTICE, my Brothers MELLOR, LUSH, and myself, when the case was very ably argued by Mr. Willis for the plaintiff, and by Mr. Thesiger and Mr. Wood Hill in support of the rule, and the Court took time to consider its judgment.

The law is, to a certain extent, determined by the case of *Indermaur v. Dames*, L. R. 1 C. P. 274, affirmed in error, L. R. 2 C. P. 311. There is an obligation on the part of the occupier of property, whether fixed or moveable, to those who, at his invitation, express or implied, come on that property, to take, by himself and servants, reasonable care that the person so coming shall not be exposed to unusual danger. And that obligation extends to the workmen sent by a tradesman to repair part of the machinery. Mr. Justice WILLES, in delivering judgment in that case, after referring to the undisputed law that there was such an obligation on the part of a shopkeeper to his customer, and that there was no such obligation to a servant, proceeds to give the reason of the judgment in these terms: "The class to which the customer belongs includes persons who go, not *as mere volunteers [* 128] or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation express or implied." In *Morgan v. Vale of Neath Ry. Co.*, 5 B. & S. 570, 33 L. J. Q. B. 260 (affirmed in error L. R. 1 Q. B. 149), which was earlier in date than *Indermaur v. Dames*, L. R. 1 C. P. 274 (affirmed in error L. R. 2 C. P. 311), the reason why a servant cannot sue his master for negligence of a fellow servant was put on the ground, that it was an implied part of the contract between master and servant that the servant should, as between them, take upon himself such risks. In the more

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recent case of *Wilson v. Merry*, L. R. 1 H. L. Sc. 326, the House of Lords, in a Scotch case, decided that the owners of a colliery were not responsible to their servants for an injury occasioned by the negligence of the general superintendent of the mine, to whom the defendants had delegated their whole power and authority. It does not appear from the report that the cases of *Morgan v. Vale of Neath* and *Indermaur v. Dames* were brought to their Lordships' notice, but the LORD CHANCELLOR (LORD CAIRNS) seems to us to have arrived by independent reasoning at the principle, that the exemption from liability was from the contract between the master and his servant, and to base his judgment upon it. He says: "The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with the business. . . . At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business." (L. R. 1 H. L. Sc. at p. 332.)

In the present case the accident happened before the actual commencement of the voyage, but it is clear that the deceased was on board only because he was going on that voyage as a pilot, and under the same terms as to risk as if the voyage had begun. We think, therefore, that the question in the present case is reduced to this, whether there is between the owners of a ship and [* 129] the pilot whom *they are compelled to employ an implied contract that the pilot shall take upon himself the risk of injury from the negligence of the ship-owners' servants. *Indermaur v. Dames*, L. R. 1 C. P. 274 (affirmed in error L. R. 2 C. P. 311), decides that there is no such implied contract between the owner of machinery and those who are sent by their masters to repair it. And we think that there is no such implied contract in the case of a pilot. The law as to pilots is now regulated by the Merchant Shipping Acts. The pilot is, by 17 & 18 Vict. c. 104, s. 365, subject to a penalty if he refuses to take charge of the ship. The master is, by sect. 353, bound under a penalty to employ the pilot. The rate of remuneration is, by sect. 358, neither to be more nor less than the fixed rate, though both parties should agree. And by sect. 388 the owner is not to be liable for the pilot as his servant. By a subsequent enactment, 35 & 36 Vict. c. 73, s. 9,

No. 2. — *Smith v. Steele and others*, L. R. 10 Q. B. 129. — Notes.

power is given by bye-laws to modify sect. 358 so far as to allow any pilot or class of pilots any rate less than the rate for the time being demandable by law; but no power is given to enable a pilot to demand more. He cannot, therefore, make any special bargain to receive larger pay in consideration of his taking this risk upon him. An ordinary servant has, as Lord CAIRNS points out (at least theoretically), the power of choosing whether he will enter into the employment of a master who does not agree to act personally in the management of his business, or as an alternative to be responsible for the negligence of those he employs. The pilot has no such choice; he must conduct the ship on the terms fixed by the statutes which regulate pilotage; and we can find nothing in those statutes to justify the conclusion that the pilot is to take upon himself the risk.

We therefore think that the rule should be discharged.

Rule discharged.

ENGLISH NOTES.

The above case may be read in connection with the general subject of what has been called "invitation" in connection with negligence. The general subject has been fully treated under Nos. 17, 18, and 19 of "Negligence," and notes 19 R. C. pp. 60 *et seq.*

AMERICAN NOTES.

The principal case is cited in McKinney on Fellow Servants, p. 51, as authority for the proposition that where the service is made compulsory by law, the fellow-servant rule does not apply.

No. 3. — *Hammond v. Rogers. The Christiana, 7 Moore's P. C. 160. — Rule.*

No. 3. — HAMMOND *v.* ROGERS.

“THE CHRISTIANA.”

(1850.)

No. 4 — POLLOK *v.* McALPIN.

“THE LOCHLIBO.”

(1850.)

No. 5. — THE MONTE ROSA.

(1892.)

RULE.

A PILOT in charge of a ship has supreme authority in the conduct of the navigation; but the owners may become responsible for the consequences of an order given by him influenced by the interference of a member of the crew; or for the neglect of an act belonging to the ordinary administration of the ship as well as to the navigation.

Hammond and others v. Rogers and another.

“The Christiana.”¹

7 Moore's P. C. 160–173.

Master and Crew. — Pilot. — Respective Duties. — Consequences of Joint Negligence.

[160] The duties of the master and crew of a vessel, with a licensed pilot on board, defined and pointed out.

The *onus probandi* lies on the owner of a ship, claiming exemption from liability for damages, under the Pilot Act, 6 Geo. IV. c. 125, s. 55 (see now Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, s. 633), by reason of having a licensed pilot on board, to prove that the damage was occasioned by the fault of the pilot.

The 6th Geo. IV. c. 125, only relieves owners of vessels from liability for damages done by their ship, where the damage is occasioned by the fault, negligence, or misconduct of the pilot alone.

A ship, having a licensed pilot on board, whilst at anchor in the Downs, the weather being bad, was run into by another vessel, and made to start

¹ *Present*: Lord LANGDALE, Lord CAMPBELL, Mr. Baron PARKE, and the Right Hon. T. PEMBERTON LEIGH.

No. 3. — *Hammond v. Rogers. The Christiana*, 7 Moore's P. C. 160-162.

from her anchorage, and was driven into a vessel at anchor. *Held*, that she was to blame and liable to damages, because

First, the ship, notwithstanding the bad weather, and a large number of vessels lying wind-bound in the Downs, had neglected to send down her top-gallant and main-royal yards, and also her short fore and mizzen-top-gallant masts; and

Secondly, that she did not set her stay-sail and jib, and so drag her anchor off shore.

In such circumstances, *held* (affirming the Decree of the Admiralty Court), that the neglect to set the stay-sail and jib after she was driven from her anchorage, was the fault of the pilot alone; but that the neglect in not sending down the top-gallant masts, &c., the cause of damage, was the joint fault of the pilot and master, and that the owners were not exonerated by the Pilot Act, 6 Geo. IV. c. 125, s. 55.

When the vessel came to anchor in the Downs, the duty of the pilot ended, but as he did not quit the ship, she continued under his charge.

This was a cause of damage, civil and maritime, instituted in the High Court of Admiralty by the respondents, the owners of the barque, *Marshal Bennett*, of 360 tons, against the American ship, *The * Christiana*, of 762 tons, to recover [* 161] the loss sustained in a collision between the two vessels in the Downs.

The Act on Petition alleged, that the barque *Marshal Bennett*, bound from London to Constantinople, with a general cargo, on the 1st of December, 1848, came to anchor in the Downs, the wind blowing strong, with hard squalls from W.; that on the morning of the 4th, the wind blowing a strong gale from the W. S. W. and S. S. W., the best bower cable was veered out to the end, when about five A. M. the man on the look-out descried the ship *Christiana* right ahead, not more than three ships' lengths, driving fast into the hawse of the barque, the night being dark and the ship showing no light, whereas the barque had a bright light in her cuddy; that the ship drove so fast that it was impossible for the barque's chain to be slipped in time to avoid her, and very soon after she struck *The Marshal Bennett* and caused her considerable damage, and it alleged, that the collision was entirely owing to the carelessness or want of skill of those on board *The Christiana*, who, notwithstanding the bad state of the weather, and the large number of vessels (above 100) lying wind-bound * in the Downs, and also notwithstanding she had [* 162] been driving the greater part of the night, neglected to send down *The Christiana's* top-gallant and main-royal yards, but

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kept the same across, as also her short fore and mizzen-top-gallant masts; although the same or similar precautions were adopted by *The Marshal Bennett* and other vessels in the Downs, whereby they were enabled to ride out the bad weather in safety, some of them with only one anchor down; and that had *The Christiana* adopted such precautions, she would, in all probability, have rode out the weather, and the collision been avoided; that even after *The Christiana* was found to be driving from her anchors, no measures were taken on board of her, by exhibiting a light, or otherwise, to give timely warning to other vessels, in consequence of which neglect, prior to her collision with the barque, she had come in collision with another vessel called *The Rouennais*, and that, had her stay-sail and jibs been set, she would have dragged her anchor off shore and cleared *The Marshal Bennett*, or to avoid the collision, she might have slipped from her anchor and gone out to sea.

The answer of the owners of *The Christiana* alleged, that on the night of the 3rd of December, the wind blowing strongly from the W. S. W., she was brought up by her small bower anchor, and seventy-five fathoms of chain, under the directions of a licensed Trinity pilot, there being about 150 vessels lying in the Downs, wind-bound; that early in the morning of the 4th, it being dark, the wind having veered to S. S. W., a heavy squall came on, during which a strange barque drove down, stern foremost, upon *The*

Christiana, and occasioned her to start her anchorage;

[* 163] * that the ship's best bower anchor was then let go, under the pilot's order, and the best bower chain veered out to sixty fathoms, the ship continuing to drive, when, all at once, the barque was seen right a-stern, whereupon the pilot, considering that veering out of more chain would be dangerous, from the close proximity of the two vessels, ordered the veering to be stopped, and that the fore top-mast stay-sail should be set, the fore yards filled, and the helm put hard-a-starboard (which was instantly done), in order, if possible, to sheer the ship clear of the barque, which was hailed to slack away or slip their chain; that the barque's crew paid no attention to the hailing, nor made any attempt to avoid a collision, and the ship drove down upon the barque; that at this time, only one of the barque's crew appeared on deck, and her chain was foul; that the entire management of *The Christiana* throughout the premises was in the hands of the

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pilot only, and that all his orders were instantly and implicitly obeyed. The answer denied that there was any occasion for her to have sent down her top-gallant and main-royal yards, and her short fore and mizzen-top-gallant masts, or either, at the period of her being brought up, or that her not having sent them down occasioned the collision, which was solely occasioned by the strange barque being driven into her; it further alleged, that *The Christiana* had a large and brilliant lamp burning in the after-cabin, the light from which could be seen a great way off through the large windows in her stern, and there was a large bright binnacle-lamp on the higher part of her poop, visible for three miles; it denied, that she had been in collision on the night aforesaid, save as aforesaid; and the answer alleged, that the collision in *question, if not the result of accident, was im- [* 164] putable to the negligence or unseamanlike conduct of those on board the barque, *Marshal Bennett*, and was in no degree imputable to *The Christiana*, or to any one on board *The Christiana*, but if to any one, it was imputable to the pilot then in charge of the ship, and all whose orders and directions had been obeyed in the management thereof, and by reason thereof they submitted, that under the provisions of the Act of Parliament, the owners of *The Christiana* were not chargeable with the damage accruing to *The Marshal Bennett*.

Witnesses were examined on both sides, the effect of whose testimony is stated in the judgment.

The Judge of the Admiralty Court (the Right Hon. Dr. LUSHINGTON), who was assisted by two of the Elder Brethren of the Trinity House, was of opinion, that *The Christiana* was to blame, and pronounced for the damages against *The Christiana*; first, because that vessel had neglected to send down her top-gallant and main-royal yards, also her short fore and mizzen-top-gallant masts; and, secondly, because she did not set her stay-sail and jib, and so dragging her anchor off shore; that, though the latter was the fault of the pilot alone, the first was a neglect, not only of the pilot, but of the master, and consequently the owners, according to the rule laid down in the case of *The Diana*, 4 Moore's P. C. Cases, 11, were not protected by the statute, there being joint negligence on the part of the master and the pilot.

From this decree the present appeal was brought, and now came on for argument.

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[* 165] * The Attorney-General (Sir John Jervis) and Dr. Addams, for the appellants.

The judgment of the Court below proceeds upon an erroneous basis. It has nothing to do with the true question to be tried, whether *The Christiana* had neglected to send down her top-gallant and main-royal yards, also her short fore and mizzen-top-gallant masts or not, when she was started from her anchorage; since the pilot on board has deposed, that there was no occasion to send them down, and that it did not occasion the collision. The cause of the collision was *The Christiana* being driven from her moorings, and assuming that, when so driven, she was rendered less capable of control in consequence of her yards and masts not having been sent down, was she, therefore, to be responsible for the damage? The collision occurred from an inevitable accident. *The Itinerant*, 2 W. Rob. 236. There might be gross negligence in not sending down the yards and masts, yet, if the injury did not arise directly therefrom, it is too remote, and *The Christiana* cannot be made liable for it. *Lynch v. Nurdin*, 1 Q. B. 29. Assuming, however, that it was otherwise, the bringing up of the vessel, the manner in which she should be anchored was the duty of the pilot. *The Gipsy King*, 2 W. Rob. 537. The keeping up or sending down the yards and masts were exclusively the duties and within the province of the licensed pilot in charge, whose functions when the vessel drifted re-devolved upon him. If the fault then was his, the owners are not accountable for his fault, or incapacity. Abbott on Shipping, pp. 182, 345, 6th ed. by Shee: they are entitled to the protection of the statute 6 Geo.

IV. c. 125, s. 55, and exonerated from liability. *The* [* 166] * *Atlas*, 2 W. Rob. 502; *Lucey v. Ingram*, 6 M. & W.

302. — [Lord CAMPBELL: Suppose the pilot has a fit, or is drunk?] — In the first case there would be no pilot; in the second, he could be lawfully superseded. The case of *The Duke of Manchester*, 2 W. Rob. 470, 6 Moore's P. C. Cases, 90, is an authority, that if the orders of the pilot are wrong, the master should not follow them. In a case of obvious danger the master is bound to interfere in the management of the vessel, although a licensed pilot be on board. *The Girolamo*, 3 Hagg. Adm. Rep. 169. A pilot is *pro hac vice* the commander of the vessel, and has absolute control, unless incompetent or disabled. There cannot be joint neglect when there was not co-equal authority, unless, as in the

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case of *The Diana*, 4 Moore's P. C. Cases, 11, where the master and crew neglected their duty, a distinction existing between acts of omission and commission. *The Marshal Bennett* herself was *in delicto*, for her anchor was not in a proper condition.

Sir Frederick Thesiger, Q. C., and Dr. Bayford, for the respondents.

This case comes within, and must be governed by, the principles laid down in *The Diana*. That was a case of joint negligence of the master and crew and the pilot, and it was held, that the statute 6 Geo. IV. c. 125, s. 55, did not exempt the owners of a vessel, having a licensed pilot on board, from liability for damages done by their vessel, unless the damage was solely caused by neglect, default, incompetency, or incapacity of the pilot. Here the negligence of the master of *The Christiana* in not sending down the yards and the masts was the real cause of collision.

The Christiana dragging her anchor was caused by *her [* 167] not adopting the precaution taken by other vessels, of sending down her yards and masts. This was not the duty of the pilot. — [Mr. Baron PARKE: If the dragging of her anchor was the cause of damage, whose fault was it that the main-royal yards and masts were not taken down? You say that the master and pilot were both to blame. If they were not, and it was the dragging her anchor that caused the injury, whose business was it to see to that and prevent it? Who is responsible for the neglect? In the case of *The Diana*, both master and pilot were to blame.] — It was the duty of the master. The pilot's duty was, in fact, at an end, the moment the vessel was brought to anchorage at the Downs. — [Baron PARKE: In Falconer's Marine Dict., Tit. "Pilot," it is said that after a pilot is taken on board, the master is no longer answerable.] — A vessel at anchor is under the sole control of the master.

The Attorney-General in reply.

The vessel being wind-bound in the Downs, and the pilot not having quitted her, the duty of the pilot had not terminated, as he was in charge of the vessel, and consequently exonerated the owners. The Pilot Act, 6 Geo. IV. c. 125, s. 55.

Mr. Baron PARKE:—

This case, which came before their Lordships on an appeal from the Admiralty Court, is of importance, inasmuch as it involves

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the consideration of the respective duties and liabilities of the pilot, the master, and crew, when the vessel is under the care of a pilot. It is a cause of damage civil and maritime, prosecuted by the owners of *The Marshal Bennett* against the American ship *Christiana*.

[* 168] *The charges of negligence against those on board *The Christiana* appear, from the act on petition, to have been four: First, that, notwithstanding the bad state of the weather, the large number of vessels (about 100) lying wind-bound in the Downs, and also notwithstanding *The Christiana* had been driving about the greater part of the night, those on board her neglected to send down the top-gallant and main-royal yards, and also her short fore and mizzen-top-gallant masts, though the same or similar precautions were adopted by *The Marshal Bennett* and other vessels in the Downs, whereby they were enabled to ride out the bad weather in safety, some of them with only one anchor down; and that, had *The Christiana* adopted the same precautions, she would in all probability have ridden out the weather, and the collision would not have taken place. Secondly, that, after *The Christiana* was driving, those on board did not take proper precautions, by exhibiting a light or otherwise, to give timely warning to other vessels. It was also stated that, besides the collision complained of, she fell foul of the French ship *Rouennais* before *The Marshal Bennett*. Thirdly, that, after leaving *The Rouennais*, those on board *The Christiana* might have cleared *The Marshal Bennett*, if they had set their stay-sail and jib, and so might have dragged their anchor off shore. Fourthly, that they might also have slipped their anchors, and gone out to sea, and so have avoided the collision.

The answer on behalf of *The Christiana* was, first, that she was under the care and management, at the time of the collision, and before, of a duly licensed Trinity pilot, whose orders were implicitly obeyed. Secondly, that the collision was caused, not by the ship driving by the mere force of the wind, but in [* 169] *consequence of a strange barque driving her from her moorings about half-past two A. M., during a heavy squall, and that every precaution was afterwards taken to prevent her coming in contact with other vessels. Thirdly, that a light was duly exhibited on board *The Christiana*. Fourthly, that they did set their stay-sail and jib at the proper time to avoid the collision.

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and that there was no occasion to send down the top gallant mast and main-royal yards, and her short fore and mizzen-top-gallant masts. And, lastly, that the damage might have been prevented if the crew of *The Marshal Bennett* had kept a good lookout, and had slipped her cable; but that it was foul, and consequently that step was not taken, and, therefore, though the crew of *The Christiana* might be in fault, the owners were not responsible.

The disputed questions of facts were disposed of, and we think satisfactorily, by the learned Judge below, with the assistance of the Trinity Masters. The neglect to exhibit a light, or give timely warning, by *The Christiana*, after she broke from her mooring, was also disproved. We think also that the fact was, that *The Christiana* was driven from anchorage, not by the force of the wind, but by collision with another vessel. Whether she afterwards ran into a French vessel (*The Rouennais*) or not, does not appear to us to be material. Nor do we see any reason to disagree with the conclusion of the Trinity Masters that *The Christiana* was in fault in not setting the stay-sail and jib, and so dragging the anchor from the shore, after she was driven from her anchorage, and that she was justified in not slipping from her anchor, and going to sea. We are satisfied with their opinion, that *The Marshal Bennett* was not guilty of any neglect whereby the collision could *have been avoided. We also [* 170] think it clear that, though *The Christiana* came to anchor the night before, and the pilot might have left her, yet that, as he did not, she continued under the charge of the pilot. And we think also, that they came to a right conclusion, that, considering the state of the weather, and the position the vessel was in, with a large number of vessels lying wind-bound in the immediate neighbourhood, it was a neglect not to send down the top-gallant and main-royal yards, not even after she began to drift, — a fact admitted on both sides; and that, if this had been done, either when the vessel anchored, or after she drove, the collision might have been avoided, and that this neglect was the cause of it.

The disputed facts being thus disposed of, the question is, whether, upon these facts, the owners of *The Christiana* are responsible or not?

This is a very important question, and it depends upon the extent of exemption which the ship-owner is entitled to, when his vessel is in charge of a pilot. The exemption depends upon the

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statute 6 Geo. IV. c. 125, s. 55, which enacts that no owner or master shall be answerable for the damage which shall happen from or by reason or means of the neglect, default, incompetence, or incapacity of any licensed pilot duly acting in charge of the vessel under the provisions of this statute.

It was held, at first, in putting a construction upon this statute, that if a pilot was on board, and there was a neglect in the navigation of the vessel, it was *primâ facie* attributable to him, and that he, and not the owner, was responsible, unless it was shown that his orders were disobeyed. This is laid down in *Bennet v.*

Moita (7 Taunt. 258). Subsequently a different, and, we [* 171] think, a more correct, view of this *subject was taken by

Dr. LUSHINGTON, the Judge of the Admiralty Court, in the case of *The Protector* (1 Wm. Rob. 45), when, on a full consideration of the question, it was held, that the master and owners were *primâ facie* liable, and that the *onus probandi* was thrown on them to show that the neglect was that of the pilot. In order, then, to free the owners in this case from responsibility, it was their duty to show, that the neglect to send down the top-gallant yards, masts, &c., was the neglect of the pilot. Further, it was held in the case of *The Diana* (1 Wm. Rob. 131), affirmed on appeal by this Court (4 Moore's P. C. Cases, 11), that the owners were responsible, unless the neglect which caused the damage was solely that of the pilot. If it was the fault of both the pilot and the master or crew, the owners are still responsible. The question then is, whether the omission which is decided to have been the cause of collision in this case, has been shown by the appellants to be that of the pilot only.

The duties of the master and the pilot are in many respects clearly defined. Although the pilot has charge of the ship, the owners are most clearly responsible to third persons for the sufficiencies of the ship and her equipments, the competency of the master and crew, and their obedience to the orders of the pilot in everything that concerns his duty; and, under ordinary circumstances, we think that his commands are to be implicitly obeyed. To him belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in one only.

The expressions attributed to the learned Judge, in the report of his judgment in this case, we are perfectly satisfied, was never

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intended to suggest that, *under ordinary circumstances, [*172] the master was to exercise any discretion whether he would obey the pilot or not. There may be extraordinary occasions when the master would be justified in disobeying the commands of the pilot. If, from sudden illness or intoxication, he becomes incompetent to command, the supreme authority would revert to the master during the period of the pilot's temporary incapacity. It may be the same in the case of manifest incapacity of a permanent character; but any opinion upon these questions is unnecessary for the decision of the present case, as none of these circumstances occurred. The pilot has, unquestionably, the sole direction of the vessel in those respects where his local knowledge is presumably required; the direction, the course, the manœuvres of the vessel, when sailing, belong to him; and the Trinity Masters, therefore, rightly decided, that the neglect to set the stay-sail and jib, after *The Christiana* was driven from her anchorage, was the fault of the pilot alone. It was, also, his sole duty to select the proper anchorage-place and mode of anchoring, and preparing for anchoring, as was held to be clear in the case of *The Gipsey King* (2 W. Rob. 537).

Whose neglect, then, was it, that the top-gallant yards, masts, &c., the cause of damage, were not sent down? The Trinity Masters considered that it was the fault, not of the pilot exclusively, but of both the pilot and the master; that the former, when he brought the vessel to anchor, ought to have seen that the top-gallant yards, &c., were sent down, as a part of the proceeding of anchoring; and after the vessel drifted, he ought to have done so, as a part of his duty in navigating the ship; but that the master was bound, in the ordinary course of navigation, and independently *of local knowledge, to do the same thing, in [*173] the first instance, in such an anchoring ground, and under such circumstances as *The Christiana* was placed in. This, we have good reason to believe, was the ground on which their opinion was founded; had this been a local usage, depending on local circumstances, we should have thought that it was the exclusive duty of the pilot to have taken care that that usage was complied with; but the step being one which every master, according to the ordinary course of navigation, ought to have taken in every open roadstead, where many vessels were lying, and in blowing weather, that duty was not exclusively the pilot's but that of the master also; and if

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the pilot had given express orders to the master not to send down the top-masts, &c., we do not say that the owners might not have been excused from responsibility for the consequences of that omission.

We certainly are not bound, any more than the learned Judge of the Admiralty Court was, by the opinion of the Trinity Masters, but we, of course, give great weight to their nautical experience, and we do not see any ground for being dissatisfied with the opinion that they formed. We think that the fault in this case was one for which the pilot was not exclusively responsible, and, therefore, that we ought to advise Her Majesty to affirm the judgment of the Admiralty Court.

Pollok (appellant) v. McAlpin (respondent).

The Lochlibo.

3 Wm. Rob. 310-331 : 7 Moore's P. C. 427-435.

Compulsory Pilotage. — Scope of Pilot's Duty.

[427] The owners of a vessel having a duly licensed pilot on board are protected from liability for damage solely occasioned by the fault of the pilot.

Aliter. If the blame is mutually imputable to the pilot and master and crew.

Where a collision was occasioned by the improper sailing and steering of a vessel, the exclusive act of the pilot, the owners of the vessel were held (reversing the judgment of the Court below) entitled to the exemption provided by the statute 6 Geo. IV. c. 125, s. 55.

This was an appeal from the Court of Admiralty, in [* 428] a cause of damage, civil and maritime, promoted * by the respondent, the master and sole owner of the vessel *Aberfoyle*, against the ship *Lochlibo*.

The facts of the case sufficiently appear from the judgment of Dr. LUSHINGTON, in the Court below, and the judgment of the Right Hon. T. PEMBERTON LEIGH in the Appeal Court hereinafter set forth.

The judgment of Dr. LUSHINGTON in the Admiralty Court was as follows (*The Lochlibo*, 3 W. Rob. 316-331):—

[3 Wm. Rob. 316] Dr. LUSHINGTON:—

Gentlemen, the Court is much indebted to you for the long and patient attention which you have bestowed in the discussion of this case; a case which involves in itself a very con-

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siderable amount of property, and entails upon our consideration some questions of fact of no small difficulty. With regard to any questions of law, there are none (it appears to me) which give rise to any difficulty on the present occasion, and in bringing under your notice the facts of the case, it must be my endeavour to point out to you, as clearly as I can, the precise questions upon which it will be necessary for me to request your opinion, and as far as it may be in my power to simplify the evidence, without attempting to enter into very minute details upon that which has already been so thoroughly sifted. It appears, gentlemen, that *The Lochlibo*, the vessel proceeded against, of 1006 tons, was proceeding with a cargo of timber, bound to the port of London, and *The Aberfoyle*, of the burden of 460 tons only, was on the prosecution of a voyage from Calcutta to London with a cargo of sugar. It is also stated that both * ships were in charge of regularly licensed pilots; [* 317] that *The Aberfoyle* was at anchor at the time of the collision, and the collision took place at eleven o'clock on the night of the 14th December last. With respect to the precise place in which *The Aberfoyle* was so anchored at the period of the collision, that will probably be a matter for consideration presently. With regard to the weather, it is to be collected from the representation of the witnesses that originally the night had not been very dark nor hazy, but that as it advanced it became dark, and the weather, to a certain extent, more hazy. Such is, I think, the fair result of the whole of the evidence upon this part of the case, without troubling you by going into it minutely. The wind, it is to be observed, is variously described by the witnesses on the one side and the other. By the master and pilot of *The Lochlibo* it is represented as blowing from the S. S. E., by other of the witnesses as blowing from the N. W. Under this discrepancy in the respective statements, we must, I apprehend, take it as somewhere between the two points. It appears that the tide was running in favour of *The Lochlibo*, and that she was proceeding, it is variously stated by the witnesses, from seven to eight and a half knots an hour.

Now, gentlemen, the first question which arises is one which, I think, we shall have no difficulty in disposing of in a very short space of time. It is this, viz.: whether the collision in question was occasioned by inevitable accident or not; in other words, whether it is a case in which neither party is to blame. If either of the two vessels was to blame in any particular, whether from

the default of the crew or of the pilot, or from the joint [*318] misconduct of both, * then, of course, the collision could not be the result of inevitable accident. Now, taking into consideration the state of the wind, the tide, the weather, and all the other facts and circumstances of the case, I am bound to tell you that in my judgment this collision could not have arisen from what we call inevitable accident. This is my judgment upon this part of the case, and, of course, I shall be prepared to reconsider that opinion if you, gentlemen, should be induced to come to a different conclusion. By inevitable accident I must be understood as meaning a collision which occurs when both parties have endeavoured by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident. In this acceptance of the term it does not, I repeat, appear to me possible to say that a collision, which took place in the manner and under the circumstances which this did, can be said to come under that definition. Assuming that you shall coincide with me in this opinion, our next inquiry must be from whose fault did the collision arise; whether from the fault of either of the pilots alone, or from the fault of the pilot and crew of *The Lochlibo*, or of those on board *The Aberfoyle*. Before entering into the investigation of these particulars, I think it expedient here to point out to you what I apprehend to be the principle of law, as applying to certain facts which are admitted in this case; I allude to the facts, that *The Aberfoyle* was at anchor, and that *The Lochlibo* was under sail at the time when this collision took place. Under this state of circumstances, gentlemen, it is, I conceive, perfectly clear that *primâ facie* the principle of law would be, that the *onus probandi* lies with [*319] the * owners of *The Lochlibo* in the present instance. This was wisely and properly admitted by the learned counsel for *The Lochlibo* in the course of their argument. The owners of *The Lochlibo*, therefore, are bound to establish by credible evidence that she was not to blame at all, or that the blame of the collision solely rested with the pilot who was on board, in which case the owners would be clearly exonerated from all responsibility. Now, in considering this point in the case, I will begin in order of time with the case which is set up by the owners of *The Aberfoyle*, the parties proceeding in the cause, in their act on petition. It has been contended that *The Lochlibo*, having proceeded on her voyage

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after the pilot had been taken on board, the master of that vessel was responsible for the collision in question, for not taking in sail, and thereby diminishing the speed of his vessel; or in not having brought up, as it has been urged he ought to have done under the circumstances of the case. In support of these two positions, the case of *The Girolamo*¹ was cited; and I will now, gentlemen, shortly state to you what that case was, and how far I do not altogether accede to the propositions of law as laid down by the learned counsel under the authority of that case. In that case *The Girolamo*, the vessel proceeded against, was proceeding down the river Thames when a fog came on, and the vessel still continuing her course, she ran into another vessel in the neighbourhood of Woolwich. In the course of the argument in the case, a great deal of discussion was entered into with respect to a point which does not embrace our present consideration, viz.: whether the Pilot Act did or did not apply to the owners of foreign vessels. In delivering his judgment in that case Sir J. NICHOLL *observed [*320] to the following effect: “Did this accident arise (he says) from the neglect, default, incompetency, or incapacity of the pilot, or was the master *in pari delicto*? It occurred from the vessel going on in the fog, not from any act of bad steerage, want of knowledge of shoals, or any incapacity as pilot, but from proceeding at all. It seems to be nearly admitted, that if the vessel had set off in this fog, blame would have been imputable to the master; if so, was he not blameable in going on in the fog? Had he not a right to resume his authority? Did he not owe it to his owners, and to other persons whose property might be damaged by a collision, to insist upon bringing the vessel up? If he was in as much haste to get out of port as the pilot was to finish his job, were they not *in pari delicto*? Was not the master bound, in duty at least, to remonstrate with the pilot, and to represent the danger of proceeding? Yet he says in his affidavit that he did not in the least interfere. In this respect the case is, as far as I am aware, new; and one of too much difficulty to arrive at any hasty decision upon, unless there be no other points upon which the case may be disposed of.” In point of fact, therefore, the case of the *Girolamo* is no authority whatever upon the point in question. From the observations of the learned Judge who decided that case, it is probable the leaning and bearing of Sir JOHN NICHOLL’s mind was,

¹ 3 Hagg. Adm. Rep. 169.

that the master would be responsible for not having interfered under the circumstances. The case, however, of *The Girolamo* was not decided upon these grounds, nor can it be considered as a case in point in the present instance. Gentlemen, such being my view

of the case in question, I am now bound to tell you, that [* 321] whatever might be the decision in the case * referred to,

looking to the circumstances of the present case, I am of opinion, that where a pilot is taken on board at Dungeness, for the purpose of navigating a vessel to Gravesend or Margate, or wherever it may be within his pilot ground, all the responsibility attaches on the pilot; and it is no part of the duty of the master to interfere or determine whether the vessel ought to be brought up at the South Foreland, or in the Downs, or in Margate Roads; and I cannot consider in this case that the master was to blame even if you should be of opinion that the vessel proceeded against ought to have been brought up as suggested. It appears to me that it would be a most dangerous doctrine to hold forth, considering the duties imposed upon pilots, and the experience and local knowledge they are supposed to possess, if I were to sanction the interference of the master in any way in the performance of those duties which the pilot must be considered more peculiarly competent to discharge, and of which the master, in the majority of cases, must be a very inferior judge. I do not, of course, in these observations intend to go the extraordinary length of saying that under no possible state of circumstances is the master justified in interfering with the pilot. If the latter was utterly incompetent to the proper discharge of his duties, it would clearly be incumbent upon the master to interfere for the protection of the lives and of the property on board his vessel. Such, however, would be a case of extreme necessity. Looking more immediately to the circumstances of the present case, I am clearly of opinion that it was entirely within the province of the pilot to determine whether the

vessel should proceed or not, and that the master is in no [* 322] wise culpable in not * having interposed or interfered in the matter in question. Having thus adverted to one of

the main grounds for blame imputed to the master of *The Lochlibo* by the owners of *The Aberfoyle*, I now approach the facts relating to the collision itself. In so doing, I must briefly refer to the evidence which has been already so much travelled over, and I will first direct your attention to the statement of the pilot on board

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The Lochlibo. After having stated in his deposition on the 4th article, that on boarding *The Lochlibo* he had two lights placed, one on each spritsail yard arm, and that he continued them there until the ship arrived off the South Foreland, when they were taken in, and two men were stationed on the look-out, one at each bow, he further deposes to this effect, "that the captain suggested the boatswain as an additional look-out at the bowsprit, and, as the boatswain states, between the knightheads and the bowsprit, the chief mate being stationed on the port waist." Gentlemen, it does not appear to me necessary to call into question whether the boatswain was specially appointed by the master or the pilot to take up the look-out; he did take up the look-out, and apparently sees better than any one else, because he sees the vessel, *The Aberfoyle*, at an earlier period than the rest of the crew who were on deck. After stating, upon this subsequent article, that he passed by close to the South Sandhead light-ship, with a view to avoid ships that might be within anchorage ground, he comes to the period of time immediately preceding the collision, and deposes to this effect: Just previously to the collision, he says, "I saw a light on our port beam, which I supposed to be, and afterwards found out was, the light from a ship * named *The Camden*, [* 323] from Quebec, which was at anchor about half a mile off us, and two miles from the shore. I pointed her out to the captain, and at the same time remarked upon the hazy state of the weather, stating, that as we were then situated, there would be more risk in anchoring, or attempting to anchor, than in proceeding through to Margate Roads." Here then is a conversation relating to *The Camden*, antecedent to the discovery of other ships. He then goes on to state in these words, "I had just said this, when the look-out forward, but whether it was the boatswain or not I do not exactly know, though I think it was, reported a vessel right ahead." — gentlemen, I submit to you that this vessel could not have been *The Camden*, respecting which the conversation had taken place between the pilot and the master, because that vessel bore a light, and was on the port beam of *The Lochlibo*, — "immediately upon which I ordered the helm hard aport, the sails having been some time before so trimmed as to admit of the helm being put hard aport without neutralising their effect. I did not see the vessel so reported at all before the collision in question; but after the collision I saw a very large light-ship to the N. N. E. of me,

standing at least from twelve to fifteen feet out of the water, which I think it very probable was the vessel so reported." According to this statement it appears that there were two vessels in the neighbourhood of *The Aberfoyle* at the time of the collision: and when I look to the statement of Sackett, the pilot on board *The Aberfoyle*, his statement satisfies me that this evidence is so far correct. He says, *The Aberfoyle* was then in as good a berth as any vessel in the Downs, and I have known the Downs [* 324] about forty years. There were two barques * at anchor near her in a fair berth for her, one on her starboard bow, I should say about two cables' length, or a short quarter of a mile, off her, but both were inside her. The description thus given by Sackett of two barques in the neighbourhood of *The Aberfoyle* appears to me precisely to correspond and tally with the evidence of the plaintiff of having seen *The Camden* and a barque, the name of which is unknown. Now, when the barque was reported by the man on the look-out, the pilot of *The Lochlibo* does this: "He says, as soon as he heard the vessel reported, he ordered the helm to be put hard aport. The helm had not been put hard aport three minutes before the look-out forward reported a vessel on the starboard bow, and immediately added, 'Hard astarboard the helm, or you'll be over him,' and I instantly ordered the helm hard astarboard." Gentlemen, the master corroborates the statement that it was on the starboard bow, but the boatswain declares positively it was right ahead, and repeats it on interrogatory. Now the question here arises, whether this measure for starboarding the helm was a right or a wrong measure, and if it was a wrong measure, who was to blame for it. The determination of this question, gentlemen, must rest with yourselves; and it will be for you to say whether, considering the state of the wind and tide, and also that *The Lochlibo* had answered her port helm three or four points, and was swinging with the tide, as described by the boatswain, it was consistent with good seamanship to order the helm to be put astarboard, a measure which it appears to me must have taken some little time before it could produce any effect, and the [* 325] whole result of which, according to * the witness, was to neutralise the sails. Gentlemen, I confess that in my opinion it does appear to me that the measure was totally wrong, and that in all probability the collision would not have taken place if such a measure had not been pursued. If I am correct in this

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opinion, we shall presently have to consider, with some minuteness, whether or not the starboarding the helm of *The Lochlibo*, as stated, was or was not exclusively the act of the pilot. *Prima facie*, undoubtedly it would be presumed that the pilot gives all directions for the altering the helm, and if erroneous, he alone is responsible. But before we proceed to consider more minutely this question, let us for a moment take that which is necessarily a preliminary inquiry, viz., whether there was a good look-out kept on board *The Lochlibo*. It is sworn in the evidence of some of the witnesses that the whole crew were on deck, and that two persons were placed, one on each bow, and the boatswain was between the knightheads and the bowsprit. It is certainly very much to be regretted, in the present instance, that the case is deprived of the evidence of either of the two persons who alone are admitted to have been appointed to the look-out. It is, I must say, a great misfortune that such an omission should have occurred, as it places the Court, and you also, gentlemen, in a state of no small difficulty. The account which has been given of the absence of these two individuals is, I must confess, very unsatisfactory; because it is quite evident that after this collision had taken place the owners of *The Lochlibo* must have anticipated that some proceedings would be taken against her, and the owners must have known that in such a case the look-out would necessarily have been one of the most material features in the * case, and the two wit- [* 326] nesses in question would be witnesses of great importance.

If it had been averred that these persons had suddenly gone away and could not be discovered, the case would stand differently; but I do think, in the absence of any such explanation, that their non-production is a neglect of which the Court has reason to complain. Gentlemen, I now return to the circumstance of starboarding the helm. I have already brought under your notice the pilot's statement with respect to the measure itself. With regard to this he says, "The look-out forward, but which of them I do not know, reported a vessel on the starboard bow, and immediately added, 'Hard astarboard the helm, or you'll be over him,' upon which the pilot," says he, "instantly ordered the helm hard astarboard." Now, gentlemen, if the boatswain erroneously imagined that this was the proper measure to be adopted, and hailed the pilot to adopt it accordingly, and the pilot unthinkingly followed the advice, I must say that in my judgment the boatswain would not

be altogether exonerated from the consequences of such advice because he was on the look-out. If, on the other hand, it was the pilot's own opinion that the measure was a proper measure to be pursued, however erroneous that opinion might be, the whole blame would fall upon the pilot. The solution of this question I feel is a matter of no small difficulty on the present occasion. The witness Cole, who I admit is competent to give evidence of what he did, has sworn distinctly that no order was given but an order to starboard the helm, and that such order was immediately obeyed. In this statement he is directly at variance with one of the other witnesses, I mean the witness Wilson. As the [* 327] whole gist of this part of the case * is whether there was any vacillation, and that vacillation prevented a decisive course being taken, and consequently brought about the damage that occurred, we must examine with some nicety how the evidence lies on this point, and whether Wilson, who has given a different testimony to the witness Cole, is a credible witness on the whole. He says, "Shortly before the collision some one forward, I think the boatswain, but I cannot be certain that it was his voice, reported a ship right ahead; but I did not see her then, nor until after the collision in question, when she appeared to me to be a barque in ballast, standing high out of the water, and painted yellow, and probably of about 500 tons burthen. Immediately she was reported, the pilot ordered the helm hard aport, and I saw the men at once heaving the port helm, and I could see by her head that our ship answered her port helm, but not a great deal; she answered her port helm as quickly as a large ship generally does. Word then came forward that there was another vessel right ahead. The report was, a vessel right ahead, and we will be right into her. I cannot say who made that report, but it was one of the people forward upon the look-out. The pilot upon that said to the man at the wheel, port; that would be to keep the helm to port, as it was; meaning, as I understood him, that they should still, notwithstanding, keep the helm aport; but the master sung out starboard. I do not know which order was obeyed; but I do not think either of them was, for I looked into the cockpit and saw the men heaving first one way and then the other."

Gentlemen, I will here refer you to the evidence of another witness, the witness Anderson, as to this part of the case. [* 328] He says to this effect, — "I heard * from the forechains,

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where I was then standing, the skipper say to the pilot, just after we struck *The Aberfoyle*, and before we got clear of her, 'I know you did wrong.' That is to say, if the expression has any meaning at all, he did wrong in starboarding his helm. You will perceive, gentlemen, that in this statement the testimony of this witness does not support the evidence of Wilson, at the same time it is not unimportant, for this reason, viz., that according to the evidence of Anderson, the master finds fault with the helm being starboarded. According to the evidence of Wilson, the master himself directs it to be put astarboard. Inconsistent as it undoubtedly seems to be, that the master should thus have given the order to starboard the helm, and after the collision had taken place should have found fault with the pilot for allowing that order to have been carried into effect, it is, in my view of it, exceeding strong evidence that there was a discussion as to which way the helm should be put, and there was something of a conflict between the pilot and the master upon the subject. Gentlemen, I am the more satisfied of this when I look to the evidence of the second mate, Fraser. He says, "The orders were given by the master during the time interrogate, except that he ordered the helm astarboard after *The Aberfoyle* had been reported, and the pilot had given the same order to the man at the helm. I cannot be sure about it, but I think it was after the pilot had ordered the helm astarboard, that the master also gave the order." Of course, if that be so, no blame could attach to the master for merely repeating the pilot's order; it would be his duty so to do. The witness, Fraser, then concludes with this averment; at the same time something was said to the effect, that if *the helm [* 329] was kept one way or another *The Lochlibo* would pass clear of the other vessel. If the statement of this witness is true, it is quite manifest that the master, upon the occasion to which he deposes, was complaining of the shifting of the helm first one way then another, and was declaring his judgment that if it had been kept from the beginning in one position, there would have been a probability of avoiding the collision. So far as it goes, therefore, the statement of this witness does to a certain extent support the testimony of Wilson. Gentlemen, it will be unnecessary for me, after the long discussion which has taken place on the present occasion, to trouble you by going through the evidence of all the other witnesses. This evidence has been most fully commented

upon and brought to your notice in the course of the argument. The questions, therefore, which I shall have to ask of you are these:—1st. Whether you are of opinion that a proper look-out was kept on board *The Lochlibo*? 2ndly. Whether the starboarding the helm was a right or a wrong measure? 3rdly. Who was to blame for the adoption of that measure? That is the most essential consideration for both parties. If the starboarding the helm was a wrong measure, it will be for you to consider whether you can suppose that a pilot, of the experience which Thornton appears to have had, would under the circumstances have directed the helm to be starboarded, unless something peculiar had occurred to induce him to adopt that measure. Gentlemen, before I conclude, I would say a word or two upon the subject of interference. I should never go the length of saying that the mere suggesting to the pilot on the part of the master to take in this sail, or [* 330] otherwise to keep as near the South Sand light, *and *vice versa*, or to bring the ship up, was interfering, in the legal acceptation of the term, with the duties of the pilot; illegal interference is of a different description. If, for example, in this case the boatswain had called out to the men below to starboard the helm, or if the master called out to port the helm, it would be interference; but it would not be interference to consult the pilot, or to suggest to him that the measures pursued were not proper, or that other measures would in all probability be attended with greater success. Gentlemen, I have I believe thus stated all that relates to *The Lochlibo*.

With regard to *The Aberfoyle*, you will have to consider whether the place where she was anchored was or was not a proper anchorage ground. You will also have to consider whether she was bound to keep a light constantly hoisted, and if so, whether in point of fact she did or did not exhibit that light. According to the evidence of two persons on board *The Aberfoyle*, they state that it was done, and in due time. It has been commented upon in the argument that the statement made to the owners of the *Aberfoyle* as to the locality where the collision occurred must necessarily be considered as an attempt to impose a false statement on the Court. If it be so, it has most signally failed in producing any effect, because I never attempt to define the precise spot where a vessel is at anchor; and I certainly have not done so in the present instance in the observations which I have thought it

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my duty to address to you. If you shall be of opinion that this circumstance at all affects the merits of the case, I shall be glad to have the benefit of your judgment upon it. Looking to the nature of the case, we cannot do better than retire and consider what conclusion we shall arrive *at. On their return to [* 331] the Court the learned Judge delivered the final decree in these words: "The gentlemen of the Trinity House, by whom I am advised, are of opinion that this collision was not the result of inevitable accident. 2ndly. That it was wrong on such a night as this is described to have been, to go through the Downs with such sail as *The Lochlibo* carried, but the blame of so doing rests upon the pilot exclusively. 3rdly. That sufficient evidence has been produced that such a look-out was kept on board *The Lochlibo* as the state of the weather required. 4thly. That the starboarding the helm just after the helm had been put apart, and the ship was under the influence of the port helm, was an erroneous measure. 5thly. That the pilot was not exclusively to blame for so starboarding the helm, but that there was undue interference with him on the part of the master and crew of *The Lochlibo*." With respect to *The Aberfoyle*, the Trinity Masters are of opinion that she was anchored in a proper situation; that she was not bound, being so anchored, to have kept a light fixed; that she exhibited a light as soon as *The Lochlibo* was seen, and that no blame whatever attaches to her. I must therefore pronounce for the damage sued for, and with costs.

On appeal to the Privy Council, after argument by Sir Fitzroy Kelly, Q. C., and Dr. Bayford, for the appellants, and Dr. Addams and Dr. Twiss, for the respondent, judgment was pronounced as follows:—

The Right Hon. T. PEMBERTON LEIGH: — [7 Moore P. C. 428]

In this case an action was entered by the owners of the ship *Aberfoyle*, against the owners of *The Lochlibo* for damage.

The Aberfoyle was lying at anchor in the Downs, on the night of the 14th of December, 1849, when about eleven o'clock, she was struck on the starboard side with great violence by *The Lochlibo*, which was proceeding up the channel.

In the Court below it was contended by the defendants, that the damage was owing in part to the fault of *The Aberfoyle*. It

was said, that she was not lying in the proper anchorage, and had not proper lights displayed, and that there was no blame attributable to *The Lochlibo*.

In the argument before us, these grounds of defence were abandoned; it was admitted, that no blame was attributable to *The Aberfoyle*, and that some blame was attributable to *The Lochlibo*;

but it was contended that such blame was attributable [* 429] exclusively * to the pilot, and that, therefore, by virtue of

the Act of Parliament, 6 Geo. IV. c. 125, the owners are discharged from their responsibility.

The Court below was of opinion, that *The Lochlibo* sailed through the Downs at a time and with a speed which made it hardly possible that she should pass without danger to other vessels, and that such sailing was improper; but that her so sailing was exclusively the fault of the pilot.

Their Lordships entirely concur with the Court below on both these points, and they think that this improper proceeding was the primary cause of the accident. But that alone is not sufficient to dispose of this case. If it appears that the subsequent accident was owing, even in part, to the misconduct of the master and crew, the owners could not protect themselves from liability, on the ground, that the pilot was also to blame, although, by directing the ship to sail at such a time and with such a speed, he was the principal author of the misfortune.

The Act of Parliament only exonerates the owners from liability, for the ignorance and misconduct of the pilot, and if the orders of the pilot are disobeyed, or the duties which belong to the master and crew are not properly performed, and an accident under those circumstances occurs, the owners remain liable.

This was distinctly decided in the case of *The Diana*, when the decision was confirmed by this Court, and the principles on which it proceeds very clearly explained by Lord BROTHAM, in the judgment reported (4 Moore's P. C. Cases, 11). In the subsequent case of *The Christiana*, which was brought here by appeal, *Hammond v.*

Rogers (7 Moore's P. C. Cases, 160), the same principles [* 430] were acted upon,* and it was held, that there might be

circumstances in which the measures to be adopted were so obvious, that though the pilot ought to have ordered them, his neglect to do so was no excuse for the master and crew omitting to adopt them.

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It was contended at the bar that, in this case, the impropriety of sailing through the Downs was so manifest, that the captain ought to have refused, in spite of the pilot's opinion, to permit the ship to proceed. But we cannot assent to this. It would be very dangerous to hold, that there can be any divided authority in the ship with reference to the same subject, and whether the ship was to anchor or to proceed was a matter which we think belonged exclusively to the pilot to decide.

The owners here have undertaken to show that their master and crew did their duty, and that the accident arose entirely from their obedience to the orders of the pilot. The question is, whether upon the whole case this is made out.

The Court below has been of opinion that proof of this has failed on these grounds.

First. That sufficient evidence has not been produced to prove that a look-out was kept by *The Lochlibo*, such as the state of the weather required.

Second. That the starboarding the helm, under the circumstances, was an improper measure, and that such measure was not the exclusive act of the pilot, but that there was an improper interference with him.

Upon the first point, two reasons only for holding that there was not a sufficient look-out were urged at our bar; one, that the two men who were employed on the look-out in the bows, have not been examined; the other, that it appears that neither of those men * first signalled the ship ahead, but it was first [* 431] signalled by the boatswain.

We are far from thinking that there is not considerable weight in these observations, but we must examine the evidence which there is, in order to judge whether, without further proof, it is or is not sufficient.

Now, the evidence is very strong upon this point. It is sworn by the master and by the two mates, and by the boatswain and two seamen, not only, in general terms, that a good look-out was kept, but they state what was done; that two men were placed, one on each bow of the ship, and that in addition to this, the boatswain was stationed in the knighthood at the bowsprit, for the same purpose. This account is fully confirmed by the pilot, and it is remarkable that Wilson, the chief mate, who, in other respects, has given material evidence against the parties who pro-

duced him, states that he has no doubt that a good look-out was kept. In addition to this, it is sworn, and not contradicted, that the pilot and the master were in constant communication with the men on the look-out, and keeping up their attention to their duty.

The fact, that notwithstanding a good look-out was kept, *The Lochlibo* came so near *The Aberfoyle*, without perceiving her, seems to be accounted for by the circumstance, that *The Lochlibo* had turned from her course, in order to avoid another ship, which was between her and *The Aberfoyle*, and it seems not improbable that this other ship would, for some time, intercept the view of *The Aberfoyle*.

Even the evidence on the part of *The Aberfoyle* seems to us to show that, although a good look-out was kept, *The Lochlibo* might well approach dangerously near to *The Aberfoyle* without seeing her. [* 432]

The allegation on the part of the claimants is, that they kept a good look-out and desiered *The Lochlibo* when she was at a distance of a quarter of a mile. Now, *The Aberfoyle* was a ship of 416 tons, lying at anchor. *The Lochlibo* was a ship of about 1000 tons, under sail, and we are informed by the Masters of the navy who assist us, that the latter ship might be seen at twice the distance at which the former would be visible.

We cannot say, therefore, that the circumstances of the case are such as to induce us to disbelieve the positive evidence on this point, on the part of *The Lochlibo*. That the boatswain should first see the ship might be mere accident; the whole interval between seeing the ship and the collision was one of but a few minutes.

We proceed then to consider whether the act of starboarding the helm was, under the circumstances, an improper act, and if so, whether it was the act of the pilot alone, or whether there was any interference with him on the part of the master or crew.

The Masters of the navy are inclined to think that, under the circumstances, considering that *The Lochlibo's* helm had just before been put hard aport, and that she was then very close to *The Aberfoyle*, it was a wrong measure to starboard the helm, though they doubt whether, in the then position of the ship, any manœuvre could have avoided the collision. But assuming the act to have been erroneous, the material question is, was it the act of the pilot alone, or was there, as held in the Court below, an improper interference with him?

This interference must consist, either in what was said by the seamen on the first discovery of the ship,* calling [* 433] out to starboard the helm; or in the orders represented by Wilson to have been given by the master. The latter ground alone was relied upon in the argument before us; and it appears to us impossible that the exclamation of the boatswain, when he found that they were close upon *The Aberfoyle*, and suggesting the manœuvre which seemed to him necessary to avoid her, can be considered as an interference. He cannot be considered as giving orders; he was not in a situation to give any. The master and the pilot were by the helm, and if what was done was done by the orders of the pilot, acting upon the best judgment which he could form, in the circumstances in which the ship was placed, with such information and advice as were given to him in the hurry of the moment, the act must be deemed exclusively his act.

The other act of interference referred to is that imputed to the master. This depends entirely upon the evidence of Wilson. He being examined on the part of the defendants, states a clear case of interference on the part of the master; for he states not suggestions made to the pilot, but that the pilot having given orders to port the helm, the master ordered it to be starboarded, and that in consequence of these contradictory orders, nothing was done, or at least nothing was done effectually with the helm, and in consequence the collision took place.

But this evidence is in direct contradiction to the testimony of every other witness on board *The Lochlibo*. The master distinctly swears that he never interfered in any way. The pilot, whose interest would rather seem to be to remove the blame from himself, not only says, that there was no interference *with [* 434] him, but he swears that he immediately ordered the helm to be starboarded, and that in his judgment, at the time of his examination, that measure was the proper measure, and did, in fact, though it could not prevent the collision, materially diminish its violence.

Now, Wilson states in his examination on interrogatories, that the pilot and the master not only gave contradictory orders, one directing the helm to be ported, the other ordering it to be starboarded, but “that each of them were then singing out to the men at the wheel, first one way and then another, so that the helms-

man did not know what to do, and heaved the helm first one way and then another."

Now if this were so, not only the master and the pilot must be guilty of direct perjury, but what was said must have been heard by other seamen as well as Wilson; at all events by the men at the wheel. Cole, one of the witnesses, was at the wheel, and his evidence is quite inconsistent with Wilson's statement. He says, "Immediately after *The Aberfoyle* was so reported, the pilot sang out to us to put the helm hard astarboard. He said, 'Hard astarboard' at once, and not first 'Starboard,' and then 'Hard astarboard;' we immediately obeyed his orders and put the helm hard astarboard accordingly, the captain being on the poop at the time, and standing by to see that we did it." This is confirmed by Anderson and by Fraser, and we must disbelieve all these witnesses, as to a matter on which their statements, if untrue, must be wilfully false, unless we disbelieve the account given by Wilson. The only piece of evidence which is supposed at all to confirm him, namely, the statements of Anderson, that the [*435] master said to the pilot immediately after the *collision, "I know you did wrong," does not at all show that the master had himself given any orders the contrary to those of the pilot.

Upon the whole, therefore, their Lordships are of opinion, that the original and principal cause of the damage was the improper sailing of *The Lochlibo*, which was the act of the pilot exclusively; that if any subsequent fault was committed by the improper steering of the ship, that also must be imputed exclusively to the pilot; and that the owners are, therefore, protected by the effect of the statute referred to.

The result is, that we must tender our advice to Her Majesty, to reverse the judgment in the Court below, and to dismiss the suit, but without any costs, either in this Court or in the Court below.

The Monte Rosa.

1893, P. 23-32 (s. c. 62 L. J. P. D. & A. 20; 68 L. T. 299; 41 W. R. 304).

Admiralty. — Collision. — Thames Rules, r. 20. — Anchor not stock awash [23] by Order of Compulsory Pilot. — Contributory Negligence.

In daylight, in the river Thames, a tug negligently came into collision with a steamer, and sustained damage from the anchor which, in breach of rule 20 of the Thames Rules, the steamer was carrying, by order of a compulsory pilot, at the hawse-pipe instead of stock awash. Those in charge of the tug were aware of the position of the anchor; but, after the negligent act of the tug had produced risk of collision, there was no time for those in charge of the steamer, by lowering the anchor or otherwise, to avert the damage.

In an action of damage by collision, brought by the owners of the tug against the steamer: —

Held, that the owners of the steamer were not responsible, for though the Thames rule was infringed, the position of the anchor was a matter within the province of the pilot in navigating the vessel, and, secondly, though the steamer was guilty of negligence in breaking the rule, still the tug, by ordinary care, exerted up to the moment of the collision, might have avoided it, and the consequent damage.

Action of damage by collision.

The plaintiffs were the Elliott Steam Tug Company, owners of the tug *Contest*. The defendants were the owners of the steamship *Monte Rosa*.

The facts — so far as material, on the question whether the defendants, the owners of *The Monte Rosa*, were responsible for the damage to the plaintiffs' tug, through a breach, by the pilot's order, of the Thames rule as to the position of the anchor — were shortly as follows: —

On June 1, 1892, the plaintiffs' screw steam-tug *Contest* of 10 tons register, engines of 50 horse-power nominal, and a crew of seven hands, was engaged, at Gravesend, in the river Thames, to assist in docking the defendants' steamship *Monte Rosa*, of 1588 tons register, engines of 250 horse-power nominal, a crew of 29 hands, and a general cargo, from Philadelphia to the South West India Dock, London, in charge of a duly licensed pilot by compulsion of law.

The tug proceeded up the river ahead of *The Monte Rosa* and, about 6 P. M., was in Bugsby's Reach, making about seven knots an hour, the weather being fine and clear, the wind fresh from *the S. W., the tide about high water. *The Monte* [* 24]

Rosa—according to the view of the evidence adopted by the Court—was heading straight up the Reach, and had the tug, about thirty feet from, and two to three points on, her starboard bow, when the master of the tug, thinking it was about time to get a rope on board, threw a line, which missed, then starboarded, and again threw a line; but this time the tug was so negligently handled, that she sheered across the bows of, and came into collision with, *The Monte Rosa*, breaking the stock of the starboard anchor of that vessel, and being herself holed in two plates, below the waterline, on the port quarter, and, in the result, her propeller being also knocked off, the tug drove ashore full of water.

The cause of the damage was disputed, the plaintiffs contending that it was done by the starboard anchor of *The Monte Rosa*, the defendants contending that it was done by her stem and starboard bow; but after the actual plates of the tug, and a model, alleged to be to scale, of the fluke of the Trotman anchor, which was projecting some six feet from the side of *The Monte Rosa*, had been inspected by the two Elder Brethren of the Trinity House who were assisting the learned Judge, the Court, on their advice, came to the conclusion that the damage was done by the anchor of *The Monte Rosa*, which, in breach of rule 20 of the Thames Rules¹ was being carried with the shackle at the hawse-pipe, so that the stock was considerably out of, and the flukes were about level with, the water.

Those in charge of the tug were aware of the position of the anchor. It had been put to the hawse-pipe by order of the sea pilot, and remained there by order of the river pilot, who, according to the master of *The Monte Rosa*, on coming on board at Gravesend, said, in substance, to him: "I see your anchor is at the hawse—leave it so," and half-an-hour afterwards said, * "Tell the mate when we ease down to go into dock the stock is to be put awash." These directions the master conveyed to the mate on the fore-castle by the boatswain, and, according to the mate, he subsequently went aft

¹ Rules and Bye-laws for the Regulation of the Navigation of the River Thames, allowed by Order in Council, February 5, 1872:—

Rule 20: "No vessel shall be navigated or lie in the river with its anchor or anchors hanging by the cable per-

pendicularly from the hawse, unless the stock shall be awash, except during such time as shall be absolutely necessary for cutting or fishing the said anchor or anchors, or during such time as may be absolutely necessary for getting such vessel under way."

No. 5. — *The Monte Rosa*, 1893, P. 25, 26.

to the pilot on the bridge, who said, in substance, to him, "Don't lower the anchor till we ease for the dock, and then lower it stock awash."

The Monte Rosa, at the time of the collision, had not eased for the dock, and it was given in evidence by the defendants that from its position at the hawse-pipe, the anchor could be promptly lowered to stock awash, but the vessel would not steer as well if the anchor were so carried. It was also proved that on seeing danger from the tug sheering across the bows, the engines of *The Monte Rosa* were stopped; and it was alleged that, as only a few seconds elapsed before the collision, there was no time, by lowering the anchor or otherwise, to avert the damage.

Pyke, Q. C., and A. E. Nelson, for the plaintiffs, the owners of the tug *Contest*.¹—The anchor of *The Monte Rosa* was being carried in a position contrary to rule 20 of the Thames Bye-laws, and as that steamer was not within any of the exceptions mentioned in the rule, her owners are responsible for the consequences of the infringement.

[GORELL BARNES, J.—That rule has not the same sanction as the Regulations for Preventing Collisions at Sea. As those in charge of the tug could see the anchor, must they not avoid it? Though they could see the anchor was in a wrong position, still they chose to run against it! Does not that bring the case within the principle of contributory negligence at common law? *Davies v. Mann*, 10 M. & W. 546 (19 R. C. 190).]

No; the owners of the tug will not be prevented from recovering, for *The Monte Rosa* might, by ordinary care, have avoided the damage. Assuming that the tug was negligently navigated, still *The Monte Rosa* was guilty of contributory negligence, for which she is liable, because the evidence shows that there was an appreciable interval of time between the tug taking the *sheer and the actual blow, and, during that time, those [* 26] in charge of *The Monte Rosa* might have averted the damage by promptly reversing the engines and lowering the anchor.

Again, the position of the anchor is essentially a matter within the control of the master, as part of the equipment of the vessel, and even if the pilot did order the anchor to be kept in the dan-

¹ Owing to the view the Court took of the facts, the arguments of the plaintiffs' counsel, as to the collision having been caused by the negligent navigation and excessive speed of *The Monte Rosa*, are omitted.

No. 5. — *The Monte Rosa*, 1893, P. 26, 27.

gerous position in which it was, still this will not exonerate the owners of *The Monte Rosa*, as the master is bound to see that the rule is not infringed, just as in the analogous case of lights. *The Ripon*, 10 P. D. 65.

Sir Walter Phillimore, and Aspinall, Q. C., for the defendants, the owners of *The Monte Rosa*.¹ — Assuming that the damage was done by the anchor of *The Monte Rosa*, her owners are exempt from liability on the ground of compulsory pilotage, for the position of the anchor is a matter strictly within the province of the pilot in navigating the vessel. *The Rigborgs Minde*, 8 P. D. 132, citing *The Gipsy King*, 2 W. Rob. 537. Where it is a question of navigation, the master would not be justified in interfering with the pilot, even though the pilot is infringing a rule. *The Argo*, Swa. 462.

Secondly, assuming that the conduct of those in charge of *The Monte Rosa* in respect of the anchor was negligent, still the position of the anchor was obvious, and the danger was one which those in charge of the tug ought not to have incurred, and the consequences of which they might have avoided: see the cases collected under this head in Addison on Torts, 6th ed. pp. 23, 24; see also the second case put in the judgment of LINDLEY, L. J., in *The Bernina*, 12 P. D. 58, at p. 89. The case of *The Margaret*, 6 P. D. 76, does not conflict with this view, as there the collision occurred at night, so that the dangerous position of the anchor was not visible to those in charge of the barge.

Finally, it is submitted, on the evidence, that the sheer of the tug took place so suddenly that there was no time for *The Monte*

Rosa to take the necessary steps to avert the damage.

[* 27] * Pyke, Q. C., in reply. — First, as to the defence of compulsory pilotage. Assuming, without admitting, that the position of the anchor may be a matter within the province of the pilot, still if he is obliged to keep the anchor at the hawse-pipe, instead of stock awash, in order that the vessel may steer, the owners of *The Monte Rosa* are responsible because they are bound to provide a vessel so trimmed and equipped that she can be navigated without infringing the rules.

Secondly, the common law principle of contributory negligence

¹ Owing to the view the Court took of the facts, the arguments of the defendants' counsel, as to the damage having been caused by the stem and starboard bow of *The Monte Rosa*, are omitted.

No. 5. — The Monte Rosa, 1893, P. 27, 28.

does not apply, for this case is not distinguishable from *The Margaret*, 6 P. D. 76, and the fact that the collision in that case occurred at night makes no difference, for, as in that case, there would have been no damage but for the anchor, so here, if the tug is to be held to blame for negligent navigation, then the defendants' steamer is also to blame because, but for her anchor, no damage would have occurred. The contributory negligence of the steamer was the immediate cause of the damage, and, both vessels being therefore to blame, the Admiralty rule as to half damages applies.

[GORELL BARNES, J. — In order to bring in the Admiralty rule as to half damages, must it not be shown that the steamer could, at the time the tug took the sheer, by the exercise of reasonable care and skill have got the anchor out of the way?]

The evidence shows that there was time for the steamer to have reversed her engines and lowered the anchor. It is also submitted that, as the steamer was breaking a rule, it was incumbent on those in charge of her to be extra-vigilant in avoiding damage to other vessels, and it cannot be that the steamer was at liberty, in breach of a rule, to carry her anchor all the way up the river in an improper position, and then, when an accident occurs, aver that it was the duty of other vessels to keep out of the way of the anchor, the dangerous position of which was the sole cause of the damage.

GORELL BARNES, J. [After detailing the facts already set out, and stating that the cause of the collision was the improper manœuvring of the tug bringing her across the bows of the steamer; that the steamer stopped on seeing the danger, but had *no time to do anything more, and that the [*28] damage to the tug was, in the opinion of the Trinity Masters, due to the anchor of the steamer, the learned Judge proceeded:—] Now, as I adopt the opinion of the Trinity Masters, and find that the anchor of *The Monte Rosa* did the material damage to the tug, questions of some nicety arise, for there can be no doubt that the anchor was carried up the Thames in a position not in accordance with rule 20 of the Thames Bye-laws, which requires the stock to be awash.

The first question to be determined is one of fact, viz., whether the anchor was in that position in accordance with the pilot's

No. 5. — *The Monte Rosa*, 1893, P. 28, 29.

orders. On that there is the evidence of the master and mate of *The Monte Rosa*. [The learned Judge read the evidence already set out, and continued:—] I have no hesitation in accepting the statement of those two officers, that the anchor of *The Monte Rosa* was in its position by the pilot's orders at the time of the accident.

Then comes the question of law raised by the defendants, viz., that the position of the anchor is a matter within the province of the pilot, even though there is a rule to the effect that it ought not to be in the position to which it was ordered by him. It is argued on behalf of the defendants that it is part of the duty of the pilot, who is in charge of the navigation of the vessel, to give orders as to the position of the anchor. It is said on the other side that that is not the true view with regard to the anchor, and the case of *The Ripon*, 10 P. D. 65, was relied on. In that case a vessel in the Humber, by the pilot's orders, exhibited, in addition to the regulation masthead and side-lights, a white light, from the main peak, showing astern. It was held that the vessel was to blame for a breach of statutory regulation, which it was impossible to say might not have contributed to the collision, and that there was no circumstance to make a departure from the regulations necessary. It was further held that the exhibition of the light by order of the pilot did not exempt the owners of the vessel from liability, as the master should not have permitted an infringement of the regulation.

The plaintiffs contend that the case of an anchor is [* 29] strictly * analogous to the case of a light; but, in my opinion, that is not so.

In *The Gipsy King*, 2 W. Rob. 537, a vessel had come into collision with another, and the anchor, which had not been hoisted on deck, nor catted as proper and customary, but which was hanging over her bow under water, made a hole in the other vessel.

Dr. LUSHINGTON said (at p. 547): "If the pilot, then, is to decide the mode of anchoring a vessel, it appears to me to follow as a necessary consequence, that the pilot is responsible to see that the anchor is in a proper situation to be dropped when necessary."

In *The Rigborgs Minde*, 8 P. D. 132, damage had been done by the fluke of a schooner's anchor piercing the side of a fly-boat. The Court found that there was no want of care on the part of the crew, and it was held that the damage was caused by the fault of the pilot in the course of his duty.

No. 5. — *The Monte Rosa*, 1893, P. 29, 30.

It is, however, urged on behalf of the plaintiffs, that even if it is part of the pilot's duty to attend to the position of the anchor, and give orders with reference to it, still the master is to blame, and his owners through him, because the master is bound to comply with the rules, and interfere with the pilot if he gives orders in connection with the anchor which infringe the rules.

I think that such a proposition cannot be laid down as sound in face of a decision like that of *The Argo*, Swa. 462, where a steamer was being navigated, under the pilot's orders, on the wrong side of the channel, contrary to the (now repealed) 297th section of the Merchant Shipping Act, 1854, and it was held that the master was not bound to interfere, and that the owners were not responsible for the damage caused thereby.

In my opinion the pilot is responsible for the position of the anchor as part of his duties in the ordering of the navigation of the ship and her manœuvres, and the case of an anchor is not analogous to that of a light, with which the pilot really has nothing to do, it being entirely the master's duty to see to the

* lights, so as to make the ship in a proper state to navigate [* 30] according to the rules.

I therefore think on this point, on which there is not very much authority, that although the rule was infringed, still as the anchor was in the position in which it was by the pilot's orders, the pilot was in fault, and the owners of *The Monte Rosa* are exempt from responsibility.

There is, however, a further point which, if established, is, I think, equally fatal to the plaintiffs' case. The rules of the Thames have not the same sanction as the sea rules, in this respect, that, in the case of the Thames Rules it must be shown that the breach of the rule contributed to the collision, whereas the statutory provisions, as to the sea rules, in substance provide, that it is sufficient to show a breach of the regulations, and then, unless the ship breaking the regulation can establish that by no possibility could that breach have anything to do with the matter, she is held to blame.

The effect of that difference is that, in the present case, which turns on the Thames rule, it must be established that the breach of the rule contributed to the collision. This brings in principles which have been very tersely expressed in Mr. Marsden's book, *The Law of Collisions at Sea*, 3rd ed. p. 23, and which are recapitulated

and adopted in Mr. Beven's book, *Principles of the Law of Negligence*, p. 943.

It seems to me that, if the case falls within the second rule, as laid down in Mr. Marsden's book, namely, that the plaintiff can recover nothing, though the defendant was guilty of negligence contributing to the collision, if the plaintiff, by ordinary care, exerted up to the moment of the collision, could have avoided it, then the plaintiffs must fail in this case.

That rule is adopted, I think, and certainly is in accordance with the decision in *Cayzer Irvine & Co. v. The Carron Co.*, 9 App. Cas. 873 (19 R. C. 220), where Lord WATSON in giving judgment, and dealing with the breach of a Thames rule by a steamer called *The Clan Sinclair*, said (9 App. Cas. at p. 887): "The new and wrong position into which I assume *The Clan Sinclair* had been [*31] brought by her neglect of the rule, * was perfectly apparent to those on board *The Margaret*, apparent for a considerable time and a considerable distance, — for a time and distance of such appreciable extent, that they could, with ordinary care, have avoided the collision which ensued; and the ground of my judgment is shortly this, that assuming that there was a breach of the rule, and culpable neglect at the time, yet the consequences of that neglect could have been avoided by ordinary care on the part of *The Margaret*."

If that is the rule, it still does not exhaust the question, because it may be that, though there was negligence on the part of the tug, yet there was negligence on the part of the steamer in that she might have avoided the consequences of the collision at the last moment by further action in connection with the anchor.

I do not forget, in dealing with this part of the case, the decision in *The Margaret*, 6 P. D. 76, where a distinction was, it appears to me, rightly drawn, if I may, with all respect, say so, between the collision and the damage ensuing, and in my observations I am treating the question of the damage being, or not being contributed to, as forming part of the matter which I have to consider.

In the present case the anchor was visible to those on board the tug, and, being so visible, was a source of danger which was apparent to them, and yet they were guilty of negligence in not avoiding coming in contact with it.

I am of opinion that not merely the collision, but the damage ensuing from it, were matters which — although the steamer may

Nos. 3-5. — *The Christiana*; *The Lochlibo*; *The Monte Rosa*. — Notes.

have been guilty of negligence, and was in fact guilty of negligence in breaking the rule — could have been avoided by the exercise of reasonable care, on the part of the tug, exerted up to the moment of collision.

Then could the steamer have done anything to avoid the damage at the last moment, or within a reasonable time before it? The argument on behalf of the plaintiffs is that she could. That question I have asked the Elder Brethren, as it is a matter of nautical skill, and their view is that the time which elapsed — from the moment when the sheer of the tug towards *the bows of [* 32] the steamer produced any reasonable risk of collision, to the time of the blow — was far too short for those on board the steamer to do anything more than they did. Their opinion is that it was almost momentary, and that anybody present and able to act, if ordered to do so, could not have acted sufficiently rapidly to have avoided this collision, and — which is the real point, having regard to the decision in *The Margaret* — the damage caused by it.

I am of opinion that the collision and the damage which flowed from it were due to the negligent action of the tug; that the position of the anchor of *The Monte Rosa* was a matter for the pilot, and that, as regards the damage done by it, the anchor was an obvious danger which could have been avoided by the exercise of reasonable care on the part of the tug; that, at the time when the tug sheered towards the steamer, no want of care was exhibited on the part of the steamer which could in any way have affected the matter, and that the tug is alone to blame. Therefore, the claim must be dismissed with costs.

ENGLISH NOTES.

It will be observed that the finding of the Trinity Masters, in accordance with which Dr. LUSHINGTON pronounced judgment in the case of *The Lochlibo*, was little in accordance with Dr. LUSHINGTON's own ruling, which was, in effect, followed by the Privy Council. This ruling was cited in *The Oakfield* (1886), 11 P. D. 34, 55 L. J. P. 11, 54 L. T. 578, 34 W. R. 687. *The Oakfield* was proceeding up the Thames in charge of a pilot. The weather was hazy; but a vessel could be seen at about three hundred yards. A flood tide was running at about two knots. *The Duchess of Albany* was lying at anchor. According to the evidence of the pilot, when he and the captain saw her, they were uncertain whether she was under way, and he ordered

No. 6. — North Ger. Lloyd S. Co. v. Elder. The Schwalbe. — Rule.

the helm to be put hard-a-port, in order to go ahead of *The Duchess of Albany*, but on the captain saying that the helm should be star-boarded, he gave this order, "to carry out the captain's order." The PRESIDENT (Sir J. HANNEN) said (11 P. D. 36, 37): "It was pointed out by Dr. LUSHINGTON in *The Lochlibo*, 3 Wm. Rob. 310, that a suggestion made to the pilot does not take away the responsibility from him. It rests with the pilot to form an opinion in regard to the captain's suggestion, and it is only when the captain gives an order contrary to that of the pilot that he takes the responsibility for the manœuvre on himself and removes it from the pilot. That this relation between captain and pilot was understood by these two men is clear, for otherwise the pilot would have left it to the captain to give the order. Therefore the entire responsibility in this case rests with the pilot. The defendants are accordingly entitled to judgment on the ground of compulsory pilotage."

AMERICAN NOTES.

As the defence of compulsory pilotage is not recognized in the United States, this rule and the following one have no application to cases arising in this country. See the American Notes to No. 28 of "Negligence," 19 R. C. 218.

**No. 6. — THE NORTH GERMAN LLOYD STEAMSHIP
CO. v. ELDER.**

"THE SCHWALBE."

(P. C. 1860.)

**No. 7. — OWNERS OF THE STEAMSHIP VELASQUEZ
v. BRIGGS.**

"THE VELASQUEZ."

(P. C. 1867.)

RULE.

To excuse the ship-owner or master of a ship for damage caused by the fault of a pilot whose employment is compulsory, it must be shown that the fault is exclusively that of the pilot. But to satisfy the burden of proof it is sufficient for the owner to show the fault of the pilot, if there is nothing in the evidence to show that the master or crew were also in fault.

No. 6. -- North Ger. Lloyd S. Co. v. Elder. The Schwalbe, 14 Moore's P. C. 241-244.

The North German Lloyd Steamship Co. v. Elder and others.¹

"The Schwalbe."

14 Moore's P. C. 241-250 (s. c. Lush. 239; 4 L. T. 160).

Compulsory Pilotage. — Sole Fault of Pilot. — Onus probandi.

A foreign steamer met at night in the river Thames, two brigs advancing in parallel courses from fifty to sixty fathoms apart from each other. The steamer, instead of porting her helm, attempted to pass between them, and thereby caused a collision, by which one of the brigs was lost. The steamer held to blame.

The 388th section of the Merchant Shipping Act, 17 & 18 Vict. c. 104 (see now Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, s. 633), protects the owners from loss or damage when occasioned by the sole fault or incapacity of the pilot where the employment is compulsory.

The *onus probandi* lies upon the owners to prove that fact, and they must prove not merely that the crew were under the pilot's orders at the time, but that the order which caused the damage was actually given by the pilot.

Where evidence is conflicting, the Appellate Court, in order to advise a reversal of the judgment appealed from, must not merely doubt whether the judgment appealed from is correct, but must be satisfied that it is wrong.

This was a collision case. The action was brought by the respondents, the owners of the vessel *The * Crown*, [* 242] against the steam-ship *The Schwalbe* and appellants, the owners thereof, for the total loss of *The Crown*, which was sunk by a collision which occurred between the two vessels.

The facts of the case as alleged, and given in evidence, sufficiently appear from the judgment of the Court delivered by

The Right Hon. Lord CHELMSFORD: —

[244]

In this case the owners of the brig *Crown* proceeded in the High Court of Admiralty against the owners of the steam-vessel *Schwalbe* to recover for the total loss of their vessel, which was sunk by a collision between the two vessels in a reach of the river Thames called the West Swin, between five and six o'clock in the evening of the 9th of January, 1859.

The Crown, a collier brig, was proceeding down the river in ballast. *The Schwalbe*, a steamer belonging to Bremen, was upon her voyage to London, with a cargo and passengers. The evening

¹ *Present:* The Right Hon. Lord CHELMSFORD, the Right Hon. Lord KINGSDOWN, and the Right Hon. Sir EDWARD RYAN.

No. 6. — North Ger. Lloyd S. Co. v. Elder. *The Schwalbe*, 14 Moore's P. C. 244-246.

was fine and clear. Both vessels had their proper lights. The parties agree as to the wind being west-southwest, and as to the courses of the respective vessels. *The Crown's* course was north-east, that of *The Schwalbe* southwest, being in an exactly opposite direction to each other.

[* 245] * In this state of things, the libel on behalf of the owners of *The Crown* alleges that one of the crew perceived the three lights of a steamer a little on the port-bow; that when the two vessels had approached to about three-quarters of a mile of each other, they perceived that the steamer had ported her helm, as her green light was gradually lost sight of, whereupon *The Crown* ported her helm; and that when the two vessels had approached to within half a mile of each other, and would have easily passed clear, the green light of the steamer again came in view; that the helm of *The Crown* was then put hard-a-port, and the steamer was hailed to port her helm and stop her engines; that no notice was taken of such hailing, and that shortly after the steamer ran stem on into the port side of the brig, cutting her down to the water's edge, and sinking her immediately. And the fifth article of the libel alleged that the collision and loss of *The Crown* were occasioned solely by the improper conduct and negligence of those on board *The Schwalbe*, more especially in starboarding their helm and not keeping a good look-out and going clear of *The Crown*, and that no blame was attributable to *The Crown*, or to any one on board of her.

The allegation on the part of the owners of *The Schwalbe* denies the article of the libel which charges that her helm was ported and then starboarded whilst approaching *The Crown*, and in contradiction thereto alleges that the helm of *The Schwalbe* was not starboarded and then ported, but ported only; and after denying that the blame of the collision is imputable to *The Schwalbe*, and

stating that it is attributable solely to the master and crew [* 246] of the brig, it alleges that if any blame is *imputable to any person on board *The Schwalbe*, it is imputable solely to the pilot, then in sole charge of her, all whose orders and directions in regard to the navigation of the steam-ship at the time of the collision were promptly and implicitly obeyed and carried out by the master and crew.

Upon these contradictory allegations, and upon evidence equally contradictory and conflicting, their Lordships have to determine

No. 6. — North Ger. Lloyd S. Co. v. Elder. The Schwalbe, 14 Moore's P. C. 246, 247.

whether the learned Judge of the Court of Admiralty arrived at the proper conclusion in finding that *The Schwalbe* was alone to blame for the collision, and that the pilot was not the person solely to blame, but that the collision also arose from "something either having been done, or omitted to be done, or done negligently, on board *The Schwalbe*."

When the two vessels first appeared in sight of each other, *The Schwalbe*, according to the evidence of her captain, was "proceeding along the edge of the Maplin Sand, pretty close to it." *The Crown*, and another collier-brig *The Ceres*, were advancing on parallel courses, from fifty to sixty fathoms apart from each other. The witnesses for *The Schwalbe* state that *The Crown* was first seen about a point on her starboard-bow, and *The Ceres* about a point on her port-bow. In this state of things there can be little doubt that the safe, as well as the correct, course, for *The Schwalbe* to pursue was to port her helm, and to pass *The Crown* on the port side. Instead of doing this, she incurred the hazard of attempting to pass between two vessels approaching her at so short a distance from each other as to range only a point on each side of her bows. Her object in adopting this course may probably be accounted for by the evidence of Fleming, * the pilot, who says, "the Maplin Sand was [* 247] as near as was safe on their starboard side." If, therefore, *The Schwalbe* had ported her helm, it must have brought her nearer than was safe to that sand. Under these circumstances, a course would naturally be preferred which would require a starboard helm instead of the opposite one. And, as upon their own showing, *The Crown*, when first seen, was only a point on their starboard-bow, it can hardly be supposed that in *The Schwalbe's* intended course between the brigs, she would not have given *The Crown* a wider berth, which could be done only by starboarding her helm. The pilot indeed says, that "upon entering the southwest reach of the West Swin, he necessarily starboarded the helm to take the proper course up the reach; but that at that time he was more than a mile distant from *The Crown* and *The Ceres*, whose respective lights came in sight just as he had steadied his helm."

In judging of the probability of the respective statements, it must be always borne in mind that *The Schwalbe* could not port her helm when the brigs were first seen, because she was as near

No. 6. — North Ger. Lloyd S. Co. v. Elder. *The Schwalbe*, 14 Moore's P. C. 247-249.

the Maplin Sand as it was safe for her to go; that her course was directed between the two brigs, although the pilot says they were in "the immediate vicinity of the Maplin Sand, and somewhat close thereto, in order to give a wide berth to the light colliers going down," which would be effected by passing them well on their port side; and that the original fault was in *The Schwalbe's* endeavour to pass between two vessels in close proximity to each other. It is probable that if this attempt had not been made, *The Schwalbe* would have gone clear of [* 248] *The Crown*; *for by the evidence of the master of the collier-brig *Bounty*, which was a quarter of a mile directly ahead of *The Crown*, *The Schwalbe* passed her safely on the port side, and "shortly afterwards he heard a hailing, and upon looking astern he saw that *The Schwalbe* had altered her course, and was as nearly as possible with her port broadside towards *The Bounty*, going stem on towards *The Crown's* port side."

The Schwalbe could only have been brought into this position after passing *The Bounty* on the port side, by starboarding her helm; and if this witness is to be believed, and there is no ground for discrediting him, the case of *The Crown*, that *The Schwalbe* was originally on her port side, and that the collision occurred in consequence of her afterwards starboarding, appears to be completely established.

Opposed to this case there is the positive evidence of the captain, some of the crew, and the pilot of *The Schwalbe*, that the helm was never starboarded, which is met by the equally positive evidence of Jobling, a seaman on board *The Crown*, that when he got into the steamer after the collision, he ran instantly aft, and there saw "that the wheel was hard-a-starboard, and that the helmsman was still holding it hard-a-starboard."

These contradictory statements are not to be reconciled by the slip made by the pilot, as described by the captain of *The Schwalbe*, in first giving the order "starboard," "but after the word had hardly escaped him, in the same breath calling, 'No! port,'"

because the first order appears not to have been passed, [* 249] but only the order to hard-a-port, in which *position the helmsman describes the helm to have been at the moment of collision.

Amidst such doubtful and conflicting evidence, their Lordships would not be disposed to disturb the judgment of the learned

No. 6. — North Ger. Lloyd S. Co. v. Elder. The *Schwalbe*, 14 Moore's P. C. 249, 250.

Judge of the Court of Admiralty, even if the counsel for the appellants had raised a doubt in their minds as to its correctness; for, to repeat the language used by them in *The North American* (12 Moore's P. C. Cases, 338), and in the case of *The Julia*, upon which judgment has just been pronounced, "in order to advise the reversal of a judgment, we must not merely doubt whether it is right, but be satisfied that it is wrong."

Although no view of the present case is free from difficulty, and no judgment can be formed upon it without hesitation, yet there being sufficient evidence to warrant the finding of the Court below, assisted as it was by Nautical Assessors, their Lordships could not with propriety reverse the decision merely upon the ground that if a judgment had been pronounced in favour of the opposite party, it would have been equally capable of being supported by the evidence produced on their side.

The Schwalbe, therefore, being found to be in the wrong, it only remains to be considered whether the owners have succeeded in exonerating themselves from their *prima facie* responsibility, by showing that the pilot was the sole author of the injury. For this purpose it is not sufficient for them to prove the vessel to have been in charge of a licensed pilot, under whose orders the crew were acting, and then to call upon the Court to presume that the particular order which occasioned the collision was given by him. By the express words of the 388th section of * the Merchant Shipping Act, which protects the owners [* 250] from loss or damage where it is occasioned by the fault of the pilot, the *onus probandi* lies upon them, as their Lordships decided in the case of *The Christiana*, 7 Moore's P. C. 160 (p. 240, *ante*), upon corresponding words in the former Pilot Act, 6 Geo. IV. c. 125. It has been shown, in the consideration of the circumstances of the collision, that it must have been occasioned by *The Schwalbe* having starboarded her helm a short time before it occurred. The owners, to relieve themselves from their liability, are bound to prove that an order to starboard the helm at this time was given by the pilot. But no such proof is anywhere to be found, except in the hasty expression (corrected, as the witness says, almost before the words were out of his mouth, and not acted upon) just at the moment of the collision. The owners, therefore, fail entirely in the evidence necessary to transfer the responsibility from themselves; and without considering whether

No. 7. — Owners of *S. Velasquez* v. Briggs. *The Velasquez*, L. R. 1 P. C. 494.

there was any negligent act or omission on the part of the crew of *The Schwalbe*, their Lordships think it sufficient to say, that the owners have not succeeded in establishing that the collision is to be attributed solely (if at all) to the fault of the pilot. They will, therefore, recommend to Her Majesty to affirm the judgment of the Admiralty Court, with costs.

The Owners of the Steamship *Velasquez* v. Briggs and others.

"The *Velasquez*." ¹

L. R. 1 P. C. 494-500 (S. C. 36 L. J. Adm. 19; 16 L. T. 777; 16 W. R. 89).

[494] *Shipping*. — *Sailing Rules*. — *Collision between Steamer and Sailing Vessel*. — *Compulsory Pilotage*. — *Joint Negligence of Pilot and Master and Crew*. — *Look-out*. — *Damages*. — *Liability of Owners*.

A steamer was sighted by a sailing vessel at a sufficient distance to have avoided a collision. The steamer took no steps until the vessels were very near each other, when she starboarded her helm, and the sailing vessel ported her helm to avoid a collision, which, notwithstanding, took place: —

Held, that the steamer was alone to blame, as it was the duty of a steamer to keep out of the way of the sailing vessel, provided she could do it, either by starboarding or porting her helm, and that, on the other hand, it was the duty of the sailing vessel to keep her course, and that she could only be excused from deviating from it by showing that it was necessary to do so in order to avoid immediate danger.

To entitle the owners of a ship under the compulsory charge of a licensed pilot to the benefit of the provisions of a statute which exempts them from liability, when a collision has occurred by the fault of the pilot, it lies on them to prove that it was occasioned solely by the pilot.

If the master and crew have contributed to the accident, by not keeping a sufficient look-out, so as to give the pilot the earliest possible information of an approaching vessel, although the pilot is also to blame, the owners are not exempted from liability for the damage.

A cause of collision.

The facts and evidence are so fully stated in the judgment of their Lordships as to render any statement here unnecessary. The Judge of the Court below (The Right Hon. Dr. LUSHINGTON) held *The Velasquez* alone to blame. Hence the appeal.

The case was argued by

Mr. Brett, Q. C., and Mr. Clarkson, for the appellants, and

Dr. Deane, Q. C., and Mr. J. P. Murphy, for the respondents.

¹ *Present*: Sir WILLIAM ELLI, Sir JAMES WILLIAM COLVILL, Sir EDWARD VAUGHAN WILLIAMS, and Sir RICHARD TORIN KINDERSLEY.

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* It was argued by the appellants, first, that the Court [* 495] below miscarried in estimating the evidence; that the sailing vessel, *The Star of Ceylon*, was not justified in departing from her course, which she ought to have kept, and that the collision occurred by her porting; secondly, that there was a good look-out kept on board the steamer; and thirdly, that if there was any one on board *The Velasquez* to blame, the pilot was the only person, and that as the pilot was in charge by compulsion of law, the owners were not liable for the damages, citing on this point *The Iona*, L. R. 1 P. C. 426, and the cases there referred to.

For the respondents, it was contended, first, that no good look-out was kept on board *The Velasquez*, and that the pilot had contributed to the accident; and secondly, that being a steamer, she neglected to alter her course, as she might have done, and thereby avoided the collision.

Judgment having been reserved, was now delivered by

Sir JAMES W. COLVILLE:—

This is an appeal on the part of the owners of the Spanish steamer, *The Velasquez*, against the sentence or decree of the High Court of Admiralty, which has pronounced that that vessel was in fault in running down the late barque, called *The Star of Ceylon*, and has condemned the appellants and their bail in the damages proceeded for, and costs of suit.

The conflict of evidence is far less than generally occurs in cases of collision. The undisputed facts of the case are: that about half-past seven on the evening of the 11th of October last the steamer, being in charge of a licensed pilot, was proceeding up channel, steering northeast by north; whilst the barque was going down channel, heading southwest by south, and, therefore, on a course parallel to that of the steamer. The wind was east by south; each vessel was making about six knots an hour through the water; and the tide, which was against the steamer, was of course in favour of the barque. It is further admitted that at some time before the collision the steamer starboarded her helm, or at least executed a manœuvre which had the effect which starboarding *a helm of the ordinary construction produces; and that the barque ported her helm. The result was a collision in which the barque, being struck on

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the port bow by the stem of the steamer, was sunk, her crew happily escaping on board of the steamer.

The case of the barque is thus stated: "The mast-head light of the steamer was first seen, at the distance of between three and four miles nearly ahead, but a little on the port bow of the barque: her red or port light was subsequently made out in the same direction. She continued to approach the barque on her port bow, and in such a direction as to involve danger of a collision unless one of the vessels ported; and as no alteration was made in her course when the two vessels were so near that it was dangerous for the barque to keep on her course, the helm of the latter was ported. Very shortly after this had been done, and the vessels would otherwise have passed clear of each other, the steamship was noticed to be making towards the barque, and as the only means of avoiding a collision, or lessening the effect thereof, the helm of the barque was put hard-a-port; but almost immediately afterwards the steamer, having shut in her red and opened her green light, ran stem on into the barque," &c. And the contention of the plaintiffs, the owners of the barque, was, that the collision was attributable solely to the carelessness, negligence, and want of skill of those on board and in charge of the steamship, more especially in their having omitted, either from want of a good look-out or otherwise, to take within sufficient time the proper measures to keep clear of the barque.

The defence on the part of the steamer raised the following case. "The barque was first seen at the distance of about three-quarters of a mile from, and being from two to three points on the starboard bow of, the steamer, and with no light then visible on board the latter. The steamer starboarded by order of the pilot, and her head went off to port, and she kept out of the way of the barque; but the latter improperly deviated from her course, under a port helm, and exhibited a red light to those on board the steamer, and caused danger of collision; whereupon, by order of the pilot, the steamer hard-a-starboarded and stopped her

engines, but the barque nevertheless ran into, and with [*497] her port bow before * the fore rigging struck the steamer on her stem and starboard bow." And the contention of the defendants was that the collision was caused by the negligent and improper navigation of the barque. Another and distinct ground of defence was, that if the collision was in any way oc-

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occasioned by anybody on board the steamer, it was occasioned solely by the licensed pilot, whose orders in respect of her navigation were promptly and implicitly obeyed by her master and crew.

In the circumstance stated, it was the duty of the steamer to keep out of the way of the sailing vessel; and provided she did so effectually, she was at liberty to do it either by starboarding or by porting her helm. On the other hand, it was the duty of the barque to keep her course, and she could be excused for deviating from it only by showing that it was necessary to do so in order to avoid immediate danger.

The learned Judge of the High Court of Admiralty, after considering the evidence, with the aid of the Trinity Masters, came to the conclusion that no blame attached to the barque; that the whole blame attached to the steamer; that blame attached to the pilot; but that blame also attached to the crew, by reason of the want of a good look-out.

At the close of the argument for the appellants their Lordships intimated their opinion that no ground had been made for disturbing this judgment in so far as it found that as between the colliding vessels the steamer was solely in fault. The conclusions which they drew from the evidence were, that the vessels were meeting port side to port side; that the steamer took no steps to avoid the barque until the vessels were very near each other; and that in these circumstances the barque was justified in porting her helm when she did port it; whilst, on the other hand, the starboarding of the helm of the steamer when it took place was a dangerous and improper manœuvre, and the immediate cause of the collision.

Upon the question whether the Court below was justified in holding that blame attached to the crew as well as to the pilot, their Lordships, having heard both sides, reserved their judgment; and it is that question alone which we have now to determine.

It has been established by a long course of decisions, both in the *High Court of Admiralty and at this board, [*498] that to entitle the owners of a ship which is under the charge of a licensed pilot to the benefit of the provision in the Act which exempts them from liability where the collision has been occasioned by the fault of the pilot, it lies upon them to prove that it was caused solely by his fault. To show to what extent this general burden lies upon the owners, it is sufficient to cite the case

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of *The Schwalbe*, 14 Moore's P. C. Cases, 241. There the cause of collision was an improper starboarding of the helm; an act of navigation presumably attributable to an order from the pilot. Yet the owners were held liable because they had failed to prove expressly that the order to starboard was given by the pilot. Lord CHELMSFORD, in delivering the judgment of this committee, said, "The owners, therefore, fail entirely in the evidence necessary to transfer the responsibility from themselves; and without considering whether there was any negligent act or omission on the part of the crew of *The Schwalbe*, their Lordships think it sufficient to say, that the owners have not succeeded in establishing that the collision is to be attributed solely (if at all) to the fault of the pilot."

Again, the cases have clearly established that if, for any act or omission which contributed to the accident, the master or crew is to blame, — then, although the pilot is also to blame, the owners are not exempted from liability. One of the strongest cases of this kind is that of *The Christiana*, 7 Moore's P. C. Cases, 160 p. 240, *ante*), for there every act of omission (and there were several of them) which contributed to the accident was an act for which the pilot was to blame; yet, inasmuch as for one of them, viz., the omission to strike and haul down certain yards and masts, the master was held to be also in fault, the owners were not exonerated from liability.

On the other hand, such cases as *The George*, 4 Notes of Cases, 161, and *The Atlas*, 5 Notes of Cases, 50, seem to show, that if it be proved on the part of the owners that the pilot was in fault, and there is no sufficient proof that the master or crew were also in fault in any particular which contributed, or may have contributed, to the accident, the owners will have relieved themselves of the burden of proof which the law casts upon them.

[* 499] * If, however, the evidence shows that there were acts of negligence on the part of the master and crew which may have contributed to the accident, as well as fault on the part of the pilot, the duty of showing that the former did not contribute in part to the accident seems to be involved in the obligation of the owners to prove that the *causa causans* of the collision was exclusively the fault of the pilot. *The Iona*, L. R. 1 P. C. 426, one of the most recent cases decided by this committee, seems to go the full length of this proposition.

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We have now to apply these principles to the present case. What are the facts deposed to by the pilot and crew of *The Velasquez*, who alone can speak to what passed on board that vessel?

The pilot says that he was on the forepart of the bridge; that he first saw a sail on his starboard bow when the barque was about three-quarters of a mile off; that he saw no light; that he ordered the helm to be starboarded; that *The Velasquez* obeyed her helm; and that shortly after he had given this order he saw the red light of the barque open.

The look-out man (a Spaniard) says that he first saw the barque on the starboard bow, and distant about a mile more or less; that he too saw no light; and that he reported the sail to the mate (also a Spaniard). And the mate, who was on the bridge with the pilot, says, that when the look-out man sang out in Spanish, "A vessel on starboard," he looked towards the pilot, who was then looking to starboard with his glasses; that he (the witness) looking in the same direction, saw the barque about three-quarters of a mile off; that thereupon the pilot gave the signal for going to port; and after that was done he (the witness) saw the red light of the barque, having previously seen no light.

Upon this evidence it is no doubt proved that the helm was starboarded by the order of the pilot, given on his own observation of the barque, and not upon any communication to him of its position.

On the other hand, it is to be observed that this evidence, if strictly true and correct, would raise some inference of a negligent look-out. For nothing is seen of the barque until she is within a * mile of the steamer, and nothing even then is [* 500] seen of her lights, although there is evidence in the cause, believed by the Court below, that her lights were burning well; and the pilot admits that on that particular night a good light might have been seen three miles off.

The evidence, however, cannot be taken to be wholly true or correct. For all these witnesses concur in representing the barque as on the starboard bow of the steamer; whereas their Lordships have found, upon the other evidence in the cause, that the vessels were approaching each other port side to port side.

If the crew and the pilot have combined consciously to put forward a false case, all that can be said is that the owners have

Nos. 6, 7. — *The Schwalbe*; *The Velasquez*. — Notes.

failed to show, by trustworthy evidence, that the fault was exclusively the fault of the pilot. But if it be assumed, as their Lordships would willingly assume, that the witnesses honestly mistook the position of the barque, the natural inference from that is, that if there had been a proper look-out, not only would the barque have been descried at a greater distance, but her true position would have been known.

That it is the duty of the crew, by means of a sufficient look-out, to give to the pilot the earliest possible information of an approaching vessel, and accurately to describe her position, was the principle enforced in the case of *The Iona*; and in the present case it may reasonably be inferred that if the pilot had received earlier information of the barque, or had been told that she was on the port side of his own vessel, he would not have given the order to starboard at all, or would have given it at a time when on a starboard helm he could have gone clear of the barque.

Their Lordships are, therefore, unable to say that there is error in the finding of the very learned Judge of the Court of Admiralty, that blame attached to the crew as well as to the pilot of *The Velasquez*; and they will humbly recommend to Her Majesty that this appeal be dismissed with costs.

ENGLISH NOTES.

The principle of *The Velasquez* was followed by the Court of Appeal in *The Daioz* (1877), 47 L. J. Adm. 1, 37 L. T. 137. This was a case of collision in which the defendants admitted that their vessel was to blame, but pleaded compulsory pilotage. Sir ROBERT PHILLIMORE in the Admiralty Court had held that the *onus* was upon the defendants to show that the orders of the pilot had been carried out; but the Court of Appeal held that the pilot was *primâ facie* responsible and as the plaintiffs had failed to show that there had been contributory negligence on the part of the master and crew, of the defendants' vessel, the owners were exempt from liability. The Court applied the rule of the Admiralty Court that where a defendant succeeded on the plea of compulsory pilotage, he should not be entitled to costs, directed that there should be no order for costs either in the Court of Appeal, or in the Court below.

 No. 8. — *The General Palmer*, 2 Hagg. Adm. 176. — Rule.

No. 8. — THE GENERAL PALMER.

(1828.)

No. 9. — AKERBLOM *v.* PRICE.

(C. A. 1881.)

RULE.

A PILOT, acting within the scope of his contract as pilot, cannot claim salvage reward: but, where a vessel is in a situation of danger, under such circumstances that the service required to rescue her involves perils or demands exertion different in kind from those of an ordinary pilotage service, the pilot effecting the rescue may claim salvage.

The General Palmer.

2 Haggard's Admiralty Reports, 176-180.

Pilot. — Claim for Extra Compensation. — Towage.

The Court, assisted by Trinity Masters, *held*, that if towing is neces- [176] sary, pilots are bound to perform it, having a claim for compensation for damage to their boats, or for extra labour: they are bound to offer their services in all weathers, and their claims for extra compensation are *stricti juris*. A tender of £50 held sufficient, and the pilots' costs refused.

This East Indiaman, bound for Madras, had sailed from Portsmouth on the 12th of January, 1828, and on the morning of the 13th a violent gust of wind, off Portland, carried away her masts. A juremast was rigged, under which she directed her course back to Portsmouth, and had reached Dunnose, when a pilot was taken on board. No signal of distress was flying. The pilot recommended that his boat should be employed to tow, and threatened to leave the vessel, if this recommendation was not complied with. Captain Truscott refused, and told the pilot to leave the ship at his peril. Subsequently, the pilot-boat (which had quitted the ship) was recalled, and was occupied for three hours in towing the vessel into St. Helen's Roads. The boat sustained some little damage; and Captain Truscott tendered at first £20 to the pilot for his services, which was rejected; and this suit was instituted

 No. 8. — The General Palmer, 2 Hagg. Adm. 176-178.

against the ship, her tackle, and cargo, and also against the owners and master thereof; and in March a tender of £50 was also rejected.

The value of the ship and cargo was estimated at £25,000, and bail was given to the amount of £2000.

The Court was assisted by two of the Elder Brethren of the Trinity House.

Phillimore and Addams, for the salvors.

Lushington and Dodson, *contrà*.

[* 177] * Judgment.

Sir CHRISTOPHER ROBINSON. — The Court is very glad that the attendance of Trinity Masters has been requested; not because the case involves any nice question of nautical skill, but as it gives the Court an opportunity of expressing some general observations on this class of cases in the presence of members of the Trinity House, who have a control vested in them over pilots, and in some respects a jurisdiction in cases of extortion or misbehaviour that might be exercised on the same facts, that might be set up as grounds of merit in this Court; constituting, therefore, under certain circumstances, a kind of concurrent jurisdiction.

This case originated in pilot service, as the men plied in that capacity and were so employed; when the pilots were told that if they left the ship it would be at their peril, they protested against any such intention, apparently under an anxiety to justify themselves in the discharge of their duties as pilots. The case comes, therefore, under the general provisions of the Acts which have been passed for the regulation of that service; unless the circumstances distinguish it from general pilot service. This, indeed, is contended on behalf of the salvors; and is also admitted in a slight degree on the part of the owners, by the tender of £50. The Court is impressed most strongly with a desire to put an accurate construction on this general question, from having had occasion to notice, during the last three months, other instances in which pilots on the coast have advanced unreasonable claims [* 178] of * salvage. Of the present case, you, gentlemen, will judge on the evidence and the arguments which you have heard. Considering the nature of the service and the provisions of the Pilot Acts, which have fixed a rate of remuneration on a liberal scale, with a power in the Trinity House to make alterations, and with a liberty of appeal on the part of the majority of

No. 8. — *The General Palmer*, 2 Hagg. Adm. 178-180.

pilots, if the rates should appear to them to be insufficient ; — considering that pilots have an exclusive privilege of service ; that they are * expected in return to be always [* 179] ready ; and that they are under an obligation to afford their assistance, unless under circumstances of absolute danger to their lives, it is of great public importance that these Acts should be faithfully interpreted, both by the pilots themselves, and by this Court, on any estimate that it may be required to take of claims of salvage growing out of such services. I repeat, therefore, that the Court is glad in being assisted by the judgment of members of the Trinity House on these questions, — Whether the state of the wind and of the tide made it impossible that the vessel should have been brought into St. Helen's without towing ; whether the assistance of towing was such an addition to the services, ordinarily required from pilots, as to constitute a salvage service ; whether the towing in this case occasioned a material damage to the pilot-boat ; and whether the general circumstances are such as found a case of extraordinary danger or labour, and thereby justify a claim for salvage remuneration.

The Trinity Masters said, their opinion was, that the vessel might have reached St. Helen's without assistance from the pilot-boat ; and that if towing was necessary, pilots were bound to perform it, having a claim of compensation for any damage to their boats, and for extra labour ; that pilots were bound to offer their services in all weathers ; and that the facts of this case did not establish a claim for remuneration beyond the tender.

COURT. — The Court entirely concurs in this opinion ; and is deeply sensible of the necessity of holding strict the construction to be put on this class of cases. It, therefore, pronounces the tender * to be ample, and reserves the question of costs till they shall have been taxed, and it may be informed what expenses have been incurred by the rejection of the tender.

In future cases, I shall neither hold the Court nor the owners bound in any manner by a tender not accepted in due time ; being fully aware of the advantage which has been taken by salvors of the rule as to tenders in speculating upon the chance of not suffering a diminution by costs, owing to the liberality which the Court has applied to salvage cases.

No. 9. — *Akerblom v. Price, Potter, Walker, & Co.*, 7 Q. B. D. 129, 130.

On the 10th of June the Court rejected the application for costs on the part of the salvors, but declined to condemn them in costs, as it was stated that the tender had been refused by advice of counsel.

Akerblom v. Price, Potter, Walker, & Co.

7 Q. B. D. 129-136 (s. c. 50 L. J. Q. B. 629; 44 L. T. 837; 29 W. R. 797).

[129]

Ship. — Pilot. — Salvage.

When a pilot has assisted in navigating a vessel from a dangerous situation to a safe anchorage, the test, whether he is entitled to be remunerated for salvage services, is not, on the one hand, whether the vessel was at the time of succour in distress, or, on the other hand, whether she was then damaged; but the test is whether the risk attending the services to the vessel was such, that the pilot could not be reasonably expected to perform them for the ordinary pilot's fees, or even for extraordinary pilotage reward.

A vessel was, during a heavy storm, being driven to leeward towards dangerous sands: her captain was ignorant of the locality, and her loss appeared almost inevitable: some pilots, seeing her danger, put off to sea at the peril of their lives in order to assist her; they were unable to board her by reason of the height of the sea: but by preceding her and signalling to her, they guided her to a safe anchorage. The vessel had sustained no damage:—

Held, that the pilots were entitled to be remunerated for salvage services.

Action to recover the sum of £48 18s. 1d., being the cargo's share of the sum of £100, paid by the plaintiff for salvage of the ship *Ailo* and cargo, and salvage services rendered to the ship and cargo.

The facts and the arguments are sufficiently stated in the judgment of the Court.

[* 130] * May 9. Day, Q. C., and Pollard, for the plaintiff.

H. Matthews, Q. C., and Ashton Cross, for the defendants.

In addition to the cases mentioned in the judgment, the following authorities were cited during the argument: *The Joseph Harreg*, 1 Ch. Rob. 306; *The Aeolus*, L. R. 4 A. & E. 29; *The Jonge Andries*, Swa. Adm. Rep. 226; *The Anders Knape*, 4 P. D. 213.

Cur. adv. vult.

June 20. The judgment of the Court (BRAMWELL, BRETT, and COTTON, L. JJ.), was delivered by

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BRETT, L. J. — In this action brought by the plaintiff, as ship-owner, to recover from the defendants, as assignees of cargo, a general average contribution, the question in dispute was reduced to be whether a sum of £100, paid by the plaintiff to certain pilots, could be legally treated by the plaintiff as against the defendants as a payment for salvage services, or whether the plaintiff as against the defendants was entitled to say no more than that the payment was for services, which, however meritorious, were only pilotage services. If the first case were made out, the plaintiff would be entitled to succeed; if the second, the whole payment must be borne by the plaintiff as the ship-owner, and the defendants would be entitled to succeed. The case was tried before POLLOCK, B., and a special jury. Two questions were left to the jury, with one only of which it is necessary to deal. The jury found that the services were only pilotage services. Upon a rule for a new trial on the ground of misdirection and as for a verdict against evidence, the Divisional Court made the rule absolute. The appeal is against that order. Upon the hearing, it appearing to us that we had all the materials before us upon which to decide the case, that is to say, that we had all the evidence of direct facts before us, and that there remained only the question of what inferential fact ought to be drawn from those facts, we considered ourselves bound to go further than the Divisional Court, and to order that the verdict for the defendants should be set aside, and judgment should be entered for the plaintiff without another trial.

The facts proved beyond controversy were that the vessel [131] sel, bound for Barrow-in-Furness, was by the violence of the wind and sea driven to leeward of her port into Morecambe Bay; that by reason of the same violence of wind and sea, the vessel could not beat to windward so as to make her port or even remain where she was, but was being driven more and more to leeward towards dangerous sands; that her captain and crew were ignorant of the locality; that the vessel, unless guided to some part of the bay in which she might take the ground or lie in comparative safety, must almost inevitably have been lost; that the pilots, seeing her peril, put to sea from harbour in order to assist her; that by going to sea in such a storm they ran no inconsiderable danger of losing their own vessel and their lives; that being unable, by reason of the height of the sea, to board the vessel, they led her, by preceding her and signalling to her, to a safe anchorage

in the bay; that (and it is a strong indication of the opinion of all present of the urgency of the position), no mention was made from the vessel or by the pilots of any port to which the vessel should be steered. The vessel had a pilot signal flying when the pilots put off and when they approached the vessel; and the vessel had not suffered any damage to her hull, spars, or sails.

Upon these practically undisputed facts, it was argued for the plaintiff that the jury ought in reason to have found for him, on the ground that the ship was in distress, and that from that fact alone when it exists, however great or small the distress, pilots are not bound to render any service to a ship except upon the terms of receiving salvage reward, and that the pilots in this case had not agreed to render services on any other terms. It was argued for the defendants that the jury were entitled and even bound to find for them, because the vessel was not herself damaged; and that unless a ship be herself damaged, pilots are bound to serve her on request as pilots; and, if they do serve her, are entitled to be paid only for pilotage service. Cases were cited from the Admiralty Reports on behalf of the plaintiff in order to support in its entirety the proposition enunciated for him. These cases were criticised on behalf of the defendants, in order to show that in all of them

there was in fact some damage to the ship itself, besides [* 132] * its being otherwise in distress. It cannot be denied that the terms used by Dr. LUSHINGTON in *The Frederick*, 1 Wm. Rob. 17, and *The Eliza*, Lush. Adm. 536, and several other cases, if accepted literally, support the plaintiff's view. Equally it cannot be denied that the criticism on them made on behalf of the defendants is, in fact, correct. The difficulty of dealing with Admiralty Reports by way of authority is, that there is no necessity in that Court that the Judge should, in the exposition of the grounds of his judgment, discriminate strictly between the proposition of law which is to be satisfied by all the facts of the case, and the rule of interpretation of the direct facts of maritime vicissitudes given in evidence, by which he desires to bind himself and his successors as to the inference of fact he and they ought, as a general rule, to draw from those facts. The latter use of authority is inapplicable as such to a trial by jury, because a jury does not disclose the reason why its members have drawn any particular inference of fact. A jury may be well assisted by having the reasoning of great Judges of the Admiralty Court explained to

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them. Upon careful consideration, we cannot adopt as a rule of law, or as a proper rule for drawing an inference of fact, the abrupt rule suggested for the defendants. And the rule enunciated by Dr. LUSHINGTON requires to be divided into its elements of law and fact, before it can be applied to a trial by jury. The fundamental rule of administration of maritime law in all Courts of maritime jurisdiction is that, whenever the Court is called upon to decide between contending parties, upon claims arising with regard to the infinite number of marine casualties, which are generally of so urgent a character that the parties cannot be truly said to be on equal terms as to any agreement they may make with regard to them, the Court will try to discover what in the widest sense of the terms is under the particular circumstances of the particular case fair and just between the parties. If the parties have made no agreement, the Court will decide primarily what is fair and just. The rule cannot be laid down in less large terms because of the endless variety of circumstances which constitute maritime casualties. They do not, as it were, arrange themselves

* into classes, of which *à priori* rules can be predicated. If [* 133] the parties have made an agreement, the Court will enforce it, unless it be manifestly unfair and unjust; but if it be manifestly unfair and unjust, the Court will disregard it and decree what is fair and just. This is the great fundamental rule. In order to apply it to particular instances, the Court will consider what fair and reasonable persons in the position of the parties respectively would do or ought to have done under the circumstances. In the case, therefore, of pilots claiming salvage reward, the ultimate proposition with regard to the pilots to be determined by the tribunal, which has to decide between the pilot and ship-owner, is, would a fair and reasonable owner and a fair and reasonable pilot, if they had had to agree, have agreed under the circumstances that the services to be performed should be performed for ordinary pilotage fees, or even extraordinary pilotage reward, or for salvage reward? would a fair owner have insisted on requiring the necessary services for ordinary pilotage fees, or even a higher rate of pilotage payment? would a fair pilot have refused to perform the necessary services unless upon the terms of a salvage reward? In such a dispute to be determined by a Judge and jury, these, besides the question of the position of the ship, are the questions to be left to the jury. In this case, for instance, the questions for the

jury were: was the ship in a position of imminent danger of being lost? was she saved from such danger by the acts of the pilots? were the acts of the pilots, by reason of the weather and the position of the ship, made so different in danger or responsibility from the ordinary acts of service of pilots, as that no fair and reasonable owner would have insisted on requiring such service for other than salvage reward? In a dispute to be determined by a Judge, in a Court of Admiralty or otherwise, these are the propositions which are to be applied to the particular facts of the case. It follows that there can be no such rigid rule of law, or of interpretation of facts, as is suggested on behalf of the defendants. It follows that the meaning of the phrase "in distress," used by Dr. LUSHINGTON, is not to be interpreted in the rigid manner suggested on behalf of the plaintiff. Suppose a ship previously reduced by accident to such a stage of unseaworthiness as makes it expedient or necessary that she should enter a port of [*134] refuge, *as by a leak or the loss of a mast, is approaching such port in moderate weather, and so that she can enter it, if steered a right course, with ease, notwithstanding the damage done to her: can it be pretended that it would be reasonable and just, within the tests above enunciated, that a pilot conducting her into port should be treated as a salvor? Yet she would be an unseaworthy ship, a damaged ship, a disabled ship, and in a sense a ship "in distress." Suppose, on the other hand, the ship, as a ship, to be intact, no damage to hull, spars, or sails, but driven by the most violent weather, without power of resistance, within half a mile of an iron-bound leeward coast, with no possibility of escape from immediate total destruction, but by entry into a narrow, and to the crew, unknown haven of the coast; and suppose the weather and position to be such that with all the knowledge and skill of the best pilot, there would still be the greatest danger that he and the ship might be lost: could any fair person say that a fair master would ask a pilot to come on board and assume such a responsibility and risk, or consider that, being on board, he should exercise such a responsible duty and run such a risk as has unexpectedly arisen, for any other than salvage reward? These hypothetical cases show that it is not the mere fact of injury to the hull, masts, or sails of the ship which is to govern, but that the tribunal must determine, whether, under all the circumstances of the particular case, the service, which the

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pilot has entered upon or has unexpectedly found imposed upon him, was rendered so different in responsibility or danger or kind from the ordinary service of a pilot, as to make it impossible that any fair owner should have insisted upon his being paid otherwise than by a salvage reward; or, whether, although there was some increased responsibility or danger or unusual kind of service, any fair pilot would have refused to enter upon the service or to continue to perform the service, unless paid otherwise than by a fair compensation for pilotage services. That a pilotage service may be turned by supervening casualties into a service to be compensated by salvage reward, is thus laid down by Dr. LUSHINGTON: "The law I have laid down in more than one instance upon this point is, that if, in the performance of a contract of towage, an unforeseen and extraordinary peril arise to the vessel towed, the steamer is not at * liberty to abandon [* 135] the vessel, but is bound to render to her the necessary assistance; and therefore is entitled to salvage reward. I am of opinion that these rights and obligations incident to a contract of towage are implied by law, and that the law thereby secures equity to both parties and the true interests of the owners of ships. A similar law holds with respect to a pilot. On certain emergencies occurring, which require extraordinary service, he is bound to stay by the ship, but becomes entitled to salvage remuneration, and not a mere pilotage fee." *The Saratoga*, Lush. Adm. 318, at p. 321. It must be remembered that in order to found a claim for salvage reward, it is absolutely essential that the ship should be in imminent danger of being lost, and should by the service be saved from such danger. It may be said therefore, and we think would be truly said, in fact in almost every, if not in every case, that whenever the ship is in such danger, the service of the pilot must necessarily be different in kind, responsibility, or danger from the ordinary service of a pilot. That, however, is a different proposition from either the one suggested for the plaintiff or that suggested for the defendants. It is consistent with the view that the true interpretation of the phrase used by Dr. LUSHINGTON is that the ship must be not merely in distress in a general sense, but in such distress as to alter the service of the pilot to the extent above suggested. It leaves the rule of law to be that in order to entitle a pilot to salvage reward he must not only show that the ship was in some

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sense in distress, but that she was in such distress as to be in danger of being lost, and such as to call upon him to run such unusual danger, or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service, as to make it unfair and unjust that he should be paid otherwise than upon the terms of salvage reward. It seems to us perfectly clear that the services of the pilots in this case were within the rule thus laid down, and that the payment to them ought to be considered as between the plaintiff and defendants as a payment of salvage reward.

We have thought it right to give our reasons at length, but we might decide this case by saying that the service rendered was one which the pilots were not bound to render; it [*136] was a * danger they were not bound to encounter; next, that the service was not one of pilotage: it was not a piloting to any port or place, but a taking out, a salving, from danger.

Judgment for the plaintiff.

ENGLISH NOTES.

The Joseph Harvey (1799), 1 C. Rob. 306, was a case in which a petition for salvage on behalf of a pilot was dismissed with costs, — it appearing to have been advanced on false pretensions, and that the pilot had misconducted himself. The following preliminary observations in the judgment of Sir W. Scott may be cited as relevant to the above rule: "It may be, in an extraordinary case, difficult to distinguish a case of pilotage from a case of salvage, properly so called, for it is possible that the safe conduct of a ship into a port, under circumstances of extreme danger and personal exertion, may exalt a pilotage service into something of a salvage service. But in general, they are distinguishable enough, and the pilot, though he contributes to the safety of the ship, is not to claim as a legal salvor."

The two following cases are reported in a note to *The General Palmer* in 2 Hagg. (at p. 178):

In *The Enterprise*, *Crosbie* (12th March, 1828), in which a pilot-boat had been employed by a steam-vessel (that had lost her rudder), to steer or tow her into Plymouth, about thirty-five miles, the Court adverted to the obligation of pilots, under the 6 Geo. IV. c. 125, and to the general principles of the maritime law, of allowing for extraordinary pilot services in cases where a vessel, in distress, might be compelled to seek a port, and held, that additional pilotage would be the proper rate of reward for such mere pilot services. And, advertent to

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the ordinary rates of pilotage at Plymouth, viz., about a guinea for every league, the Court gave the sum of £20, being double the rate of common pilotage, and £15 *nomine expensarum*.

And in *The Columbus*, Nerroll (13th June, 1828), in which a Bridlington fishing-boat had gone out of harbour, on a signal for a pilot, to the distance of about thirteen miles, and had helped to steer the vessel (an empty trader from London) into that port; the Court held, the tender of £1 10s. sufficient: — and referring to the case of *The Michael*, 31st July, 1805, in which Lord STOWELL had refused to consider fishermen (taken on board in the Channel as pilots) entitled to be rewarded as salvors, observing, "That they were engaged as pilots, and if they assumed that character they ought to adopt the rules and be remunerated according to the rates of that service," the Court reprobated the practice of instituting claims for salvage in such cases at an expense far beyond the value of the services, and refused to grant any further reward; and declared it to be its duty to be very strict in holding cases of this description to their proper character.

AMERICAN NOTES.

The rule correctly states the American law.

A leading case is *Hobart v. Drogan*, 10 Peters (U. S.), 108, where the facts were as follows: A vessel was driven on a shoal in the bay of Mobile by a gale. The wind increased to a hurricane, so that the vessel was forced on her beam ends, and her masts and bowsprit were cut away. The master and crew deserted to save their lives. After various fruitless efforts to save her, the libellants, all pilots of the outer harbor of Mobile, two days after she was stranded, and while she was yet in great peril, succeeded, and she was brought up to the city by them, towed by their pilot boat, assisted by a steam-boat hired by them. It was held that the libellants were entitled to salvage. STORY, J., delivering the opinion of the Court, said, on pp. 120-121: "We agree to the doctrine stated in the cases cited at the bar, that a pilot, while acting in it in the strict line of his duty, however he may entitle himself to extraordinary pilotage compensation for extraordinary services as contradistinguished from ordinary services, cannot be entitled to claim salvage. In this respect he is not distinguished from any other officer, public or private, acting within the appropriate sphere of his duty. But a pilot, as such, is not disabled in virtue of his office, from becoming a salvor. On the contrary, whenever he performs salvage services beyond the line of his appropriate duties, or under circumstances to which those duties do not justly attach, he stands in the same relation to the property as any other salvor; that is, with a title to compensation to the extent of the merit of his services, viewed in the light of a liberal public policy."

And again on p. 123, "No one ever heard of its being within the scope of the positive duties of a pilot to go to the rescue of a wrecked vessel, and em-

ploy himself in saving her or her cargo, when she was wholly unnavigable. That is a duty entirely distinct in its nature, and no more belonging to a pilot, than it would be to supply such a vessel with masts or sails, or to employ lighters to discharge her cargo, in order to float her. It is properly a salvage service, involving duties and responsibilities, for which his employment may peculiarly fit him: but yet in no sense included in the duty of navigating the ship."

In *The Grid*, 21 Federal Reporter, 423, it appeared that a vessel had struck on a shoal, and a pilot had boarded her, incurring considerable danger in so doing. The vessel was pounding, and soon commenced leaking. The pilot took charge, ordered anchors let go, and the crew to keep at the pumps, and when the vessel floated, at high tide, piloted her through and over the shoals into a position of safety. In the course of an opinion holding that the pilot was entitled to salvage, LOCKE, J., said: "The connection of a pilot with a vessel in distress, his duty towards her, and his right to extra compensation for efforts in her behalf, always raise delicate questions as to just how far his position as pilot demands his services and when his labor as salvor begins. There are frequently cases where the services are so unmistakably salvage and not pilotage, that there is no difficulty in determining his rights; but in others the character of the service is not so distinctly marked, and its nature more difficult to determine. Where a vessel is discovered aground, and is relieved from the bottom by a pilot and his crew by carrying out an anchor, making jettison of cargo, or heaving at windlass or capstan; or where a vessel is leaking badly, and is kept afloat by a pilot's crew pumping; or service is rendered by working an abandoned vessel, or one whose crew are worn out or disabled by sickness, and the vessel is in danger, — there can be no question but what such service would be one of salvage rather than pilotage, and that he would be entitled to compensation as such: but when the labor performed and service rendered consist only of such acts as the duty of a pilot demands, notwithstanding the fact that the vessel is in distress, or his exposure is unusual and the risk incurred more than ordinary, it is against public policy to construe it as salvage; but, whenever unusual compensation appears to be demanded, it is given as extra pilotage."

The pilot's right to recover in this case was rested on the fact that the vessel was aground in a dangerous place, that the weather was bad, and that the risk in boarding her was extraordinary and unusual.

In *Lea v. Ship Alexander*, 2 Paine (U. S. Cir. Ct.), 466, a ship was aground on a shoal not in "pilot's water," and was in danger of shipwreck. The pilot who extricated her was held entitled to salvage. The Court said that pilots may be salvors even after the relation of pilot to a particular vessel has been begun.

In *Hope v. Brig Dido*, 2 Paine (U. S. Cir. Ct.), 243, the Court said that the question whether the towing into port by a pilot of a vessel exposed to the perils of the sea, without a rudder, can be considered a salvage service, will depend on whether, by loss of her rudder, she was rendered unnavigable.

See further, on the general question, *Brig Susan*, 1 Sprague's Dec. (U. S. Dist. Ct.) 499; *Flanders v. Tripp*, 2 Lowell's Dec. (U. S. Dist. Ct.) 15;

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Dulany v. Sloop Peragio, Bee (U. S. Dist. Ct.), 212; *Hand v. The Elcira*, Gilpin (U. S. Dist. Ct.), 60; *The Wave*, Blatchford & Howland's Admiralty Cases (U. S. Dist. Ct.), 235; *The C. D. Bryant*, 19 Federal Reporter, 603; *The Wisconsin*, 30 Federal Reporter, 846; Curtis on Merchant Seamen, 289-290.

The case of *The Wave*, *supra*, was appealed to the Circuit Court, and it was there held that where the local statutes make it part of the official duty of pilots to assist vessels in distress, they are not entitled to salvage for rendering such assistance. *The Wave v. Hyer*, 2 Paine (U. S. Circ. Ct.), 131.

PLEDGE.**DONALD v. SUCKLING.**

(1866.)

RULE.

A PLEDGEE under an ordinary contract of pledge is entitled, after default, to sell the goods; and although in the meantime he transfers the possession to another, he does not annul the contract; and the pawnor is not entitled, without tender of the sum for which the goods were originally pawned, to recover the possession from the person to whom it has been transferred.

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L. R. 1 Q. B. 585-620 (s. c. 35 L. J. Q. B. 232; 14 L. T. 772; 15 W. R. 13).

Bailment of Pawn or Pledge. — Interest under Original Pledge not determined by Repledge. — Detinue. [585]

A. deposited debentures with B. as a security for the payment, at maturity, of a bill indorsed by A. and discounted by B., on the agreement that B. should have power to sell or otherwise dispose of the debentures if the bill should not be paid when due; before the maturity of the bill, B. deposited the debentures with C., to be kept by him as a security until the repayment of a loan from C. to B. larger than the amount of the bill. The bill was dishonoured, and while it still remained unpaid, A. brought detinue against C. for the debentures:—

Held (by COCKBURN, CH. J., BLACKBURN and MELLOR, JJ., SHEE, J., dissenting), that the repledge by B. to C. did not put an end to the contract

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of pledge between A. and B., and B.'s interest and right of detainer under it; and that A., therefore, could not maintain detinue without having paid or tendered the amount of the bill.

Declaration. That the defendant detained from the plaintiff his securities for money, that is to say, four debentures of the British Slate Company, Limited, for £200 each, and the plaintiff claimed a return of the securities or their value, and £1000 for their detention.

Plea. That before the alleged detention, the plaintiff deposited the debentures with one J. A. Simpson, as security for the due payment at maturity of a bill of exchange, dated 25th August, 1864, payable six months after date, and drawn by the plaintiff, and accepted by T. Sanders, and indorsed by the plaintiff to and discounted by Simpson, and upon the agreement then come to between the plaintiff and Simpson, that Simpson should have full power to sell or otherwise dispose of the debentures if the bill was not paid when it became due. That the bill had not been paid by the plaintiff nor by any other person, but was dishonoured; nor was it paid at the time of the said detention or at the commencement of this suit; and that before the alleged detention and the commencement of this suit, Simpson deposited the debentures with the defendant to be by him kept as a security for and until the repayment by Simpson to the defendant of certain sums of money advanced and lent by the defendant to Simpson upon the security of the debentures, and the defendant had and received the same

for the purpose and on the terms aforesaid, which sums of [* 586] money * thence hitherto have been and remain wholly due

and unpaid to the defendant; wherefore the defendant detained and still detains the debentures, which is the alleged detention.

Demurrer and joinder.

The case having been argued in Easter Term (April 27), before BLACKBURN and SHEE, JJ., was re-argued in Trinity Term:—

May 29. Harington, for the plaintiff. — There are two questions raised by this demurrer; first, whether a person to whom goods are delivered as a pawn has a right to pawn them to a third person; secondly, if he has, whether the defendant by his plea brings himself within the rule. First, a pawnee has no right to assign over the pawn. There is a distinction between a lien, a mortgage, and

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a pawn: a lien only gives a personal right to detain; a mortgage passes the absolute property on condition broken: whereas a pawn gives only a right to sell. In *Coggs v. Bernard*, 2 Ld. Raym. at pp. 916-917, HOLT, Ch. J., says on *radium* or pawn: "As to the property the pawnee has in the pawn or pledge, he has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him." He then adds, that if the pawn will not be the worse for using, as jewels, the pawnee may use them, but although not liable if put safely away, yet he will be answerable if he be robbed while using them; "and the reason is because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is *Ow. 123.*" HOLT, Ch. J., therefore puts a pawn simply as a deposit, to be kept, or at most used, by the pawnee himself. In *Ryall v. Rolfe*, 1 Atk. at p. 167, BURNET, J., says: "There is scarce any book that treats upon pawns, but considers them as in the possession of the pawnee;" and the other Judges present agreed to this doctrine. There again stress is laid on the possession of the pawnee himself. That case was assented to in *Reeves v. Capper*, 5 Bing. N. C. at p. 140, and the parting with possession by the bailee shown to be consistent with the terms of the particular bailment. In Bell's Commentaries, B. ii. c. vi. s. 2; vol. i. p. 564, 6th ed., it is said: "By pledge, a moveable subject, or the title-deeds, vouchers, or muniments of a debt or *jus incorporale* are delivered to the creditor, in *security of debt, [*587] to remain with him, and be detained in possession till the debtor shall redeem them; and if necessary, to be sold by judicial authority for satisfaction of the debt; the creditor engaging to restore the thing pledged when the debt shall be paid." So in Pothier, *Contrat de Nantissement*, ch. ii. s. 23; tom. viii. p. 613, ed. par Dupin, it is said: "Le créancier, à qui la chose a été donnée en nantissement, n'a que le droit de la détenir." Again in Story on Bailments, sect. 287, it is said: "In the case of a pledge of personal property, the right of the pledgee is not consummated except by possession; and ordinarily, when that possession is relinquished, the right of the pledgee is extinguished or waived." And the learned author treats the pawnee's relation to the pawnor as strictly of a fiduciary character, for in sect. 319, after stating that neither in the Roman nor common law is a pawnee allowed to purchase at the sale of a pawn, he adds: "In-

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deed the rule is founded upon a principle still more broadly enforced in equity jurisprudence, that where a fiduciary relation exists between parties, the agent shall never be permitted to obtain personal benefit to himself, by any act done or purchase made, which may prejudice the right or interests of his principal." So, in sect. 299, he says: "If the pledgee voluntarily, by his own act, places the pledge beyond his own power to restore it, as by agreeing that it may be attached at the suit of a third person, that will amount to a waiver of his pledge."

[SHEE, J. — Domat (Civil Law, b. iii. tit. 1, Pawns and Mortgages, sect. 1; vol. i. p. 346, transl. by Strahan) says: "The rule with us is, that the mortgage or pawn upon a moveable thing lasts no longer than whilst the thing is in the custody of the person who is bound, or he who has it for his security is in possession of it. But if the debtor makes it to pass into other hands, either by alienating it, or pawning it, the creditor cannot any longer lay claim to it. And this rule is expressed in these words: that moveables have no sequel by a mortgage."]

It is true that in sect. 327, Story says: "Whatever doubt may be indulged as to the case of a mere factor, it has been decided that in the case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until [* 588] the debt of * the original owner is discharged." But the authority cited for that proposition is an American, not an English case, *Jarvis v. Rogers*, 15 Mass. Rep. 389, and it does not bear out the doctrine, for that was a case of the pledge of negotiable securities; and when the case was first before the Court (13 Mass. Rep. at p. 107), PARKER, Ch. J., said: "This case is distinguishable from the common cases of agents, factors, and commission merchants, to whom property has been entrusted for special purposes, and who have no right to exceed that authority. We do not question any of those cases, nor those which have decided that he to whom property has been pledged cannot transfer a title in such property to another. We proceed upon the ground that the plaintiff's intestate had by his own act, together with the other members of the company, given a negotiable quality to these certificates." When *Jarvis v. Rogers*, 15 Mass. Rep. at p. 408, was the second time before the Court, no doubt JACKSON, J., after citing *Ratcliff v. Davis*, Yelv. 178, 1 Bulst. 29, Cro. Jac. 244, *Mores v. Conham*, Owen, 123, and *Demainbray v. Metcalfe*, 2 Vern.

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691, 698, says: "From these cases it appears that the pawnee may deliver the goods to a stranger without consideration; or he may sell and assign all his interest absolutely; or he may assign it conditionally, by way of pawn: without in either case destroying the original lien, or giving to the owner a right to reclaim them on any other or better terms than he could have done before such delivery or assignment." But this is merely *obiter*, and was not necessary for the decision of the case, and is not borne out by the cases cited. *Ratchiff v. Davis* simply decides that, on a pledge by A. to B., to secure payment of a sum of money, no day being named for payment or redemption, if B. places it with C. and then dies, on tender of the money to B.'s executor and demand of and refusal by C., A. can maintain trover against C. *Mores v. Conham* was an assumpsit, that L. held pledged goods with the plaintiff as a security for a debt, and that the defendant had promised the plaintiff to pay the debt if he would deliver the pawn, the question being, whether the promise to deliver the pawn was a good consideration to support an assumpsit. FOSTER, J., differing from the majority of the Court, * held that the pawnee [* 589] "had not such an interest in the pawn as that he might deliver it over to another, or make a legal contract for it." The majority, no doubt, held that he had such an interest as he might assign over; but even their decision goes no further than the power to assign for the amount of the original debt; for they say, "and the assignee shall be subject to a detinue if he detains it upon payment of the money by the owner." And it is observable that HOLT, Ch. J., who cites the case in *Coggs v. Bernard*, 2 Ld. Raym. at p. 917, only cites it for the doctrine that the pawnee may use the pawn if it be not injured by use. In *Demainbray v. Mitalfe*, 2 Vern. 691, 698, Gilb. Eq. C. 104, 1 Eq. C. Ab. 324, Prec. Ch. 419, the time for payment of the original debt by the pawnor had elapsed, and on his seeking to get the pawn back from an insolvent sub-pawnee, the Court refused to assist him unless he paid the whole amount due to the defendant from his pawnor; it is therefore no authority at law, but simply proceeds on the principle that he who seeks equity must do equity. If the pawnee may repledge the pawn, the sub-pledgee may do the same, and so on *ad infinitum*; to whom, then, is the original pawnor to apply? The relation between the pawnor and pawnee is of a fiduciary and personal character, and until the time for redeeming the pledge has

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elapsed, the pawnee is bound to keep the pawn. To hold otherwise would be in effect to make a chose in action assignable. Secondly, assuming the pawnee may repledge, still the facts disclosed in the plea do not justify the defendant. As against the defendant it must be taken, first, that Simpson's debt to the defendant, to secure which the debentures were pawned, was larger than the original debt of the plaintiff to Simpson, and also that Simpson pledged the debentures before the bill became due. By pledging for a larger sum the pawnee puts it out of his power to restore the article to the original bailor, and by that waives his pledge, as is said in Story on Bailments, sect. 299, already cited (*ante*, p. 304). By pledging during the currency of the bill, Simpson was guilty of a conversion: *Johnson v. Stear*, 15 C. B. (N. S.) 330, 33 L. J. C. P. 130; and he therefore passed no title to the defendant. In *Johnson v. Stear* the majority of the

Court differed from WILLIAMS, J., as to the measure of [* 590] * damages; but the decision of the whole Court is a direct authority that a sale of a pawn before the time for redemption has arrived is a conversion; and the judgment of WILLIAMS, J., certainly enunciates a more logical conclusion as to the measure of damages.

Gray, Q. C. (Gadsden, with him), for the defendant. — By the contract of pledge the pledgee acquired sufficient property in the pawn to do what the plea alleges he has done. If A. pledges a chattel to B. to secure £50, it is clearly part of the contract that A. is to pay B. before he can be entitled to have the article back; but it is said, because B. has pledged it to a third person, A. is entitled to have it back at once without paying. The judgment of HOLT, Ch. J., in the very first case cited, *Coggs v. Bernard*, 2 Ld. Raym. at pp. 916-917, is contrary to this proposition with reference to the bailment of *vadium* or pawn. A pawn or pledge is very different from a mere lien. In *M'Combie v. Davies*, 7 East, at pp. 6, 7, Lord ELLENBOROUGH says, that a lien is personal, and cannot be transferred to third persons; but he afterwards adds, that "his observations were applied to a tortious transfer of the goods of the principal by the broker undertaking to pledge them as his own; and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of goods on which he has a lien, to that other with notice of his lien, and appoints that other as his servant to keep possession

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of the goods for him; in which case he might preserve his lien." *Petersen v. Tash*, 2 Str. 1178, and *Daubigny v. Dural*, 5 T. R. 604, recognise the distinction between a lien and a pledge. So in Bac. Ab. tit. Bailment (A.) (B.), it is said that a simple bailment gives no interest in the pawn; but "pledging is where goods are delivered in security for money lent, and by such pledging the pawnee hath more than the naked possession in the nature of a bailment, for he hath the property or interest in the thing itself:" citing 2 Salk. 522. The same doctrine is enunciated in 4 Vin. Ab. tit. Bailment (B.). In *Ratcliff v. Davies*, Yelv. 178, Cro. Jac. 244, the pawnor had tendered the amount secured, so that it is no authority against the present defendant; on the contrary, * it shows that the pawnee has a special property [* 591] in the pawn until revested in the pawnor by payment or tender of the debt. In *Demainbray v. Metcalfe*, 2 Vern. 691, 698, the Court dealt with a pledge precisely as if it had been the case of a mortgage.

[SHEE, J. — The reporter, Vernon, queries that case.]

It was followed and approved in *Ex parte Deeze*, 1 Atk. 228. In Whitaker on Lien, p. 140, it is said: "The pawnee has such an interest in the pawn that he may assign it over to a third person, and the assignee will be subject to an action of detinue if he detains it after payment or tender of the money by the owner." And in Montagu on Lien, p. 22: "A pawnee may assign the pawn to the extent of his interest." All that the pawnee is bound to do is to be ready to re-deliver the pawn on payment of the debt. *Lee v. Atkinson*, Yelv. 172, Cro. Jac. 236, shows that the use of the pledge contrary to the bailment does not determine the bailment or divest the special property of the pawnee. In Bac. Ab. tit. Bailment (C.) an apparently contrary doctrine is laid down: "If a man lend another his sheep to stock his land, the borrower hath the bare use of them: but if he kill them the owner shall have a general action of trespass, or an action of trover at his election; for though the use is in the borrower, yet the property is in the lender, and the killing of the sheep is an open violation of another's property, which is complained of in the general action of trespass." For this Co. Litt. 57a is cited. Littleton says (Tenures, sect. 71): "If I lend (baille) to one my sheep to tathe (composter) his land, or my oxen to plough the land, and he killeth my cattle, I may well have an

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action of trespass against him, notwithstanding the lending "bailement). On which Coke's comment is (Co. Litt. 57 a): "And the reason is that when the bailee having but a bare use of them taketh upon him as an owner to kill them, he loseth the benefit of the use of them. Or in these cases he may have an action of trespass *sur le case* for this conversion, at his election." And these passages may have been the foundation for the doctrine that any parting with the pawn puts an end to the contract of pledge. But this doctrine cannot be maintained. In order to put an end to the contract, there must be such a dealing with [* 592] the pawn as to be * absolutely inconsistent with the continuance of the contract. The plaintiff here not having paid or tendered the amount of the bill, is in the same position as a vendee who has not paid for the goods sold, and he or his assignees cannot maintain trover against the unpaid vendor who has retained possession, although he has resold them. *Bloom v. Sanders*, 4 B. & C. 941. In that case, notwithstanding the dealing with the property by the unpaid vendee, the contract remains, and the remedy is an action on the case for such damages as the vendee has sustained, in calculating which the price he was to pay must be deducted. And this principle was applied by the majority of the Court, in *Johnson v. Stear*, 15 C. B. (N. S.) 330, 33 L. J. C. P. 130, to the case of a pawnee who had sold the pledge before the day for payment of the debt had arrived; and they held that, although the pledgee had sold, and so been guilty of a wrongful act, the nature of the contract of pledge was such that it was not put an end to by this wrongful dealing with the article pledged. Story's authority is directly in favour of the defendant. He says (On Bailments, sect. 324): "The pawnee may, by the common law, deliver over the pawn into the hands of a stranger for safe custody without consideration: or he may sell or assign all his interest in the pawn; or he may convey the same conditionally by way of pawn to another person; without in either case destroying or invalidating his security. But if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor as if he were the absolute owner, it is clear that in such a case he would be guilty of a breach of trust; and his creditor would acquire no title beyond that held by the pawnee. The only question which, under such circumstances, would seem to

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admit of controversy, is, whether the creditor should be entitled to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as if the case was a naked tort, without any qualified right in the first pawnee." And after commenting on the peculiar law as to a factor's right being only a lien, and not strictly a pledge, Story proceeds (sect. 327): "But whatever doubt may be indulged as to the *case of a factor, it has been decided, that [* 593] in the case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged;" citing *Jarvis v. Rogers*, 15 Mass. Rep. 389. Lastly, on the pleadings the defendant is entitled to judgment. The declaration is in detinue, which assumes an immediate right to possession in the plaintiff; but the plea, taken most against the defendant, shows that the original debt is still unpaid, and so negatives the plaintiff's right to possession. As to the argument of hardship on the plaintiff, he need not go to the sub-pledgee, but on tender to the original pledgee of the amount of his debt he would have been entitled to have the debentures restored to him.

Harington, in reply. — The only authority for Story's doctrine of the right of the pledgee to repledge is *Jarvis v. Rogers*; but that, as already pointed out, was a pledge of negotiable securities, and an innocent transferee for value had a right to hold them against all the world. *De Bouchout v. Goldsmid*, 5 Ves. 211, shows that under a general power to sell, assign, and transfer, an agent cannot pledge for his own debt. In *Hartop v. Hoare*, 3 Atk. at p. 52, LEE, Ch. J., delivering the judgment of the Court, points out that a pawn differs from a sale: for a pawn tends to stop the change of property in the thing pledged. *Cur. adv. vult.*

July 7. The following judgments were delivered:—

SHEE, J. [After stating the pleadings.] — This plea sets up a right to detain the debentures, founded on a bailment of pawn by the plaintiff to Simpson, under which Simpson, if the bill should not be paid, had a right to sell the debentures, paying the over-plus above the amount of the bill and charges to the plaintiff, — that is, to sell on the plaintiff's account and for his and Simpson's benefit, — and a repawn of them by Simpson as a security for a loan to him by the defendant.

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It must be taken against the defendant, that the debentures were pledged to him by Simpson before the plaintiff had made default : it must be taken, too, that the advance for which the [* 594] * debentures were pledged to the defendant by Simpson was of a greater amount than the debt for which Simpson held them; it is consistent with the facts pleaded, either that it was repayable before or repayable after the maturity of the plaintiff's bill, and that the debentures were pledged by Simpson along with other securities, from which they could not at Simpson's pleasure, or on tender by the plaintiff of the sum for which they had been pledged to Simpson, be detached; and therefore that Simpson had put it out of his power to apply them by sale or otherwise to the only purpose for which possession of them had been given to him, viz., to secure the payment of his debt and the release of the plaintiff, by the sale of them, from liability on the bill which Simpson had discounted for him.

Whether this pledge to the defendant by Simpson was such a conversion by him of the debentures as destroyed his right of possession in them, and revested the plaintiff's right to the possession of them freed from the original bailment, is the question for our decision.

The contention that a pawnee is entitled to exercise over the chattel pawned to him a power so extensive as the one which this plea sets up, was before the case of *Johnson v. Stear*, 15 C. B. (N. S.) 330, 33 L. J. C. P. 130, if it be not now, wholly unsupported by authority.

A pawn is defined by Sir William Jones (On Bailments, pp. 118, 36) to be "a bailment of goods by a debtor to his creditor, to be kept by him till his debt is discharged;" and by Lord Holt, *Copps v. Bernard*, 2 Ld. Raym. at p. 913, to be "a delivery to another of goods or chattels to be security to him for money borrowed of him by the bailor;" and by Lord Stair (Institutions of the Law of Scotland, b. i. tit. 13, s. 11), "a kind of mandate whereby the debtor for his creditor's security gives him the pawn or thing impignorated, to detain or keep it for his own security, or in the case of not-payment of the debt, to sell the pledge and pay himself out of the price, and restore the rest, or restore the pledge itself on payment of the debt; all which is of the nature of a mandate, and it hath not only a custody in it, but the power to dispose in the case of not-payment;" and by Bell (Principles of

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the Law of Scotland, sects. 1362, 1363, 4th ed. p. 512),
 "a real right or *jus in re*, inferior to property, which [*595]
 vests in the holder a power over the subject, to retain it
 in security of the debt for which it is pledged, and qualifies so far
 and retains the right of property in the pledger or owner."

In the Roman civil law, as in our own law (see *Pigot v. Cuddey*,
 15 C. B. (N. S.) 701, 33 L. J. C. P. 134), the bailment of pawn
 implied what in this bailment is expressed, a mandate of sale on
 default of payment. Without it, or without, as in the Scotch and
 French law, a right to have a pledge sold judicially for payment
 on default made, the security by way of pledge would be of little
 value. The pawnee is said by Lord Coke, in his Commentaries
 on Littleton (Co. Litt. 89 a), to have a "property;" and in *South-
 cote's Case*, 4 Co. Rep. 83 b, to have a "property in and not a cus-
 tody only," of the chattel pawned; by which Lord HOLT (2 Ld.
 Raym. at pp. 916, 917) understands Lord Coke to mean a "special
 property," consisting in this, "that the pawn is a security to the
 pawnee that he shall be repaid his debt, and to compel the pawnor
 to pay him;" or in the words of FLEMING, Ch. J., in *Ratcliff v.
 Davis*, Cro. Jac. at p. 245, "a special property in the goods to
 detain them for his (the pawnee's) security," that is, not a prop-
 erty properly so called, but the *jus in re*, that is, *in re alienâ*, of
 the Roman lawyers; the opposite, as Mr. Austin says (Lectures
 on Jurisprudence: Tables and Notes, vol. iii. p. 192), to property;
 but a right of possession against the true owner, and under a
 contract with him until his debt is paid, and a power of sale for
 the reciprocal benefit of the pawnee and pawnor on default of pay-
 ment at the time agreed upon.

Mr. Justice Story says (On Bailments, sect. 324), that "the
 pawnee may by the common law deliver the pawn into the hands
 of a stranger without consideration, for safe custody, or convey
 the same interest conditionally, by way of pawn to another person,
 without destroying or invalidating his security, but that he cannot
 pledge it for a debt greater than his own: that if he do so he will
 be guilty of a breach of trust, by which his creditor will acquire
 no title beyond that of the pawnee: and that the only question
 which admits of controversy is, whether the creditor shall
 be entitled to retain the pledge until *the original debt [*596]
 (that is, the debt due to the first pawnee) is discharged, or
 whether the owner may recover the pledge in the same manner as

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if the case was a naked tort without any qualified right in the first pawnee." So much of this passage as is stated to be clear law, viz., that the pawnee may deliver the chattel pawned to a stranger for safe custody without consideration, or convey the same conditionally (*i.e.*, it may be presumed, on the same conditions as those on which he holds it), by way of pawn to another person for a debt not greater than his own, without destroying or invalidating his security, has no application to the case before us: inasmuch as the pawn by Simpson to the defendant was not for safe custody, nor without consideration, nor conditionally, nor for a debt not greater than the debt due by the plaintiff to Simpson, and because the power given to the pawnee by this bailment to dispose of the debentures by sale or otherwise, should his debt not be paid, might probably be considered, at least after default made, to enlarge the ordinary right of a pawnee over the chattel pawned. There is nothing in the passage which affords any countenance, except by way of query, to the position, that a pawnee, who, as in this case, has placed the chattel pawned out of the pawnor's power, and out of his own power to redeem it by payment of the amount for which it was given to him as a security, and who has deprived himself of the power of selling it for the payment of the pawnor's debt, can by so doing shield the creditor to whom he repawns it from an action of detinue at the suit of the real owner. Mr. Justice Story indeed says (On Bailments, sect. 299), "That if the pledgee voluntarily and by his own act places the pledge beyond his power to restore it, as by agreeing that it may be attached at the suit of a third person, that will amount to a waiver of the pledge." It would be difficult to reconcile any other rule in respect of the pledging by pledgees of the chattels pawned to them with the well-established doctrine of our Courts and the Courts of the United States of America in respect of the pledging by factors of the goods entrusted to them. Factors, like pledgees, have a mandate of sale, — sale irrespectively of default of any kind is the object of the bailment to them; they have a special property and right of possession against all the world except their [597] principal, and against him if * they have made advances on the security of his goods entrusted to them; to give effect to that security they may avail themselves of their mandate of sale; but if they place the goods out of their own power by pledging them, although it be for a debt not exceeding their

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advances, the pawnee from them (except under the Factors Acts) is defenceless, in trover or detinue, even to the extent of his loan, against the true owner.

Why it should be otherwise between the true owner and the pawnee from a pawnee of the true owner's goods no reason was adduced during the argument before us, nor indeed was it possible to adduce any reason, seeing that in all the decisions on pledges by factors the relation between a factor who has made advances on the goods entrusted to him and his principal has been held not distinguishable or barely distinguishable in its legal incidents from the relation between pawnee and pawnor; a factor being, as Mr. Justice Story says, "generally treated in juridical discussions as in the condition of a pledgee" (On Bailments, sects. 325, 327; citing *Daubigny v. Duval*, 5 T. R. 604; *McCombie v. Davies*, 7 East, 5).

The case of *Johnson v. Stear*, 15 C. B. (N. S.) 330, 33 L. J. C. P. 130, is a clear authority for holding, that Simpson, in dealing with the debentures in the way which he must be taken on this plea to have done, was, as the defendant also was, guilty of a conversion of them; and unless that case is also an authority binding upon us for the doctrine, that the conversion by a pawnee of the thing pawned is not such an abuse of the bailment of pawn as annuls it, but that there remains in him, and in an assignee from him, and in an assignee from his assignee, and so on *toties quoties*, without limit as to the number of assignments or the consideration for them, an interest of property in the pawn which defeats the owner's right of possession, the plaintiff is entitled to our judgment.

As I read the case of *Johnson v. Stear*, and the case of *Chinery v. Wall*, 5 H. & N. 288, 29 L. J. Ex. 180, and *Brierly v. Kendall*, 17 Q. B. 937, 21 L. J. Q. B. 161, on the authority of which it proceeded, the judgments of the majority of the learned Judges of the Court of Common Pleas, in the first of them, and the judgments of the Court of Exchequer, and of the Court of

*Queen's Bench, in the second and the third, are based on [*598] the principle that, in an action to recover damages for a conversion it is not an inflexible rule of law that the value of the goods converted is to be taken as the measure of damages; that when a suitor's real cause of action is a breach of contract he cannot by suing in tort entitle himself to a larger compensation

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than he could have recovered in an action in form *ex contractu*; and therefore that when a verdict is obtained against an unpaid vendor for the conversion of the thing sold by him, or against an unpaid pawnee for the conversion of the thing pledged to him, he is entitled to be credited, in the estimate by the jury of the damages to be paid by him, for the value of such interest or advantage as would have resulted to him from the contract of sale or the contract of pawn if it had been fulfilled by the vendee or pawnor.

That this was the *ratio decidendi* in these cases seems to me clear from the facts of *Chinery v. Viall* and *Brierly v. Kendall*, which raised no question between the litigant parties in any respect analogous to the question which we in this case have to decide. In *Chinery v. Viall*, the plaintiff, who was the vendee of forty-eight sheep, for five only of which he had paid, under a bargain which entitled him to delivery of the whole lot before payment, brought his action against the vendor for a conversion by parting with the sheep to another purchaser. If the defendant's interest in the unpaid balance of the agreed price of the sheep had not been credited to him in the amount of damages, the plaintiff, who had only paid for five of them, would have pocketed the full value of the forty-three which had been converted.

In *Brierly v. Kendall*, an action of trespass, there was a loan of the defendant to the plaintiff secured by bill of sale of the plaintiff's goods, in which was a reservation to the plaintiff of a right to the possession of the goods until he should make default in some payment. Before any default the defendant took the goods from the plaintiff and sold them. For this wrong he was liable in trespass; but the measure of damages was held to be, not the value of the goods, but the loss which the plaintiff had really sustained by being deprived of the possession. The wrong—[599]—indictment of the defendant did not annihilate his interest in the goods under the bill of sale; and such interest was considered in measuring the extent of the plaintiff's right to damages.

These cases are manifestly not in conflict with, if indeed they at all touch, the principle relied upon against the plea which is here demurred to, that, if the pawnee converts the chattels pawned to him, the bailment is determined and the right of possession revested in the true owner of them.

In *Johnson v. Starr*, the defendant, a pawnee of dock war-

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rants, had anticipated by a few hours only the time at which under his contract with the owner of them he might have sold and delivered them; he had applied before the time of action brought the proceeds of their sale to the discharge of the plaintiff's debt to him, or he held them specially applicable to that purpose, and the plaintiff, had he sued the defendant in contract for not keeping the pledge until default made, could not have proved that he had sustained any damage. The CHIEF JUSTICE, speaking for himself and two of his learned Brothers, did indeed say, that "The deposit of the goods in question with the defendant, to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract" (15 C. B. (N. S.) 334-335, 33 L. J. C. P. 131); but he cannot be understood to have meant by the words "interest and right of property in the goods," and by the words "more than a mere lien" other than "a special property," as defined by the authorities before referred to by me, viz., a real right or *jus in re*, a right of possession until default made, a right of retention or sale after default made; nor, as I think, to have intended more, by the words "the wrongful act of the pawnee did not annihilate the contract between the parties," than that the contract, in the breach of which consisted the tort of which the plaintiff complained, must still be considered to subsist, at least for the purpose of being referred to for the measure of the damage sustained by the pawnor and the damages to be recovered by him.

* The case before us differs, as I think, in essential particulars, as respects the principle upon which damages would have been measurable, had the action been in trover, from the case in the Common Pleas. The defendant, as assignee of the pawnee, could not surely have set up in mitigation of damages an interest derived by him from the pawnee before default made by the pawnor; the pawnee, by the express terms of the bailment to him, not having the right to dispose of the debentures by sale or otherwise until after default made. Besides, it is impossible to shut one's eyes to the broad distinction between the case of the sale a few hours too soon of a pawn, which, as in the case of *John-*

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son v. Stear, the pawnor "had no intention to redeem," -- the proceeds of the sale being devoted before action brought to discharge of the debt for which the pawn had been given as a security, -- and the abuse of a pawn by the pawnee in wrongfully, for his own purposes, placing out of his power, and out of the pawnor's power, to redeem the pawn, should he have the means to do so.

By the contract of bailment between the plaintiff and Simpson the proceeds of the sale of the debentures, which are the subject of this suit, had been specifically appropriated to the payment of the plaintiff's bill in the event of his not being able to meet it with other means. Simpson held the debentures in trust, should the bill not be paid, to sell them on the plaintiff's account, or allow the plaintiff to sell them or raise money on them to pay his bill. Instead of that, Simpson, before default made by the plaintiff, converted them to his own use, obtaining their agreed value in pledge from the defendant, and imposing upon the plaintiff the burden of making other provision to meet his bill. By this act of Simpson the plaintiff, in my judgment, did in fact sustain damage, and at the maturity of the bill, if not before, to the full amount of the current saleable value of the debentures. I am at a loss to see how the conduct of Simpson, in thus dealing with the debentures, and how the title of the defendant, claiming under him, are to escape the operation of the rule, that if the pawnee, except conditionally (an exception for which the authority is but

slender), parts with the possession of the pawn, he loses [* 601] the benefit * of his security: *Ryall v. Rolfe*, 1 Atk. 165;

Reeves v. Copper, 5 Bing. N. C. 136; *Johnson v. Stear*, 15 C. B. (N. S.) 330, 33 L. J. C. P. 130, per WILLIAMS, J.; or the operation of the maxim, *nemo plus juris ad alium transferre potest quam ipse habet*.

For these reasons, as it seems to me, the case of *Johnson v. Stear* ought not to govern our decision. It could not be followed by us as an authority in favour of the defendant without inattention to its true principle, viz., that between the parties to a contract, the measure of damages for a breach of the contract must be the same, whether the form of action be *ex contractu* or *ex delicto*, and that in such a case, general rules applicable to the latter form, the only one competent for the redress of injuries purely tortious, are not to be strained to the doing of manifest injustice. It is open also, in a right estimate of it as an authority for the case in

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hand, to this observation:—The interest of a plaintiff in the damages recoverable by him for a tort, which is in its true nature a breach of contract, is restricted by the implied stipulations of the contracting parties to the amount which, in the conscience of a jury, may suffice to give him an adequate compensation. The action of detinue for a chattel, of which the bailment has been abused, against a person not party to the contract of bailment, is not based upon a breach of contract, and not within the rules applicable to actions of tort which are based on breaches of contract. In detinue the plaintiff sues, not for the value tantamount of the thing detained from him, but for the return of the thing itself, which may to him have a value other and higher than its actual value: and only for its value if the thing cannot be delivered to him (Tidd's Forms, 8th ed. 339), and for damages for its detention and his costs of suit. A judgment to recover the value only has been reversed for error: *Peters v. Heyward*, Cro. Jac. 682; the integral undiminished thing itself, unaffected by countervailing lien or abatement of whatever kind, being the primary object of the suit. In an action of trover for the conversion by the pawnee of the subject of the bailment, the plaintiff, according to the judgment of the majority of the Court in *Johnson v. Stear*, is entitled only to recover the amount, in money, of the damage which he proves himself * to have sustained; in [* 602] an action of detinue for the recovery from the assignee of the pawnee of the chattel pawned, and of which the pawn has been abused and forfeited, the plaintiff is entitled to recover the chattel itself, because it was a term of the contract of pawn, that if the pawn should be abused by the pawnee his right to the possession of it should cease; and the defendant can have derived no right of possession from one whose own right of possession was determined by his attempt to transfer it.

Unless, therefore, we were prepared to hold, in disregard of the clearly expressed opinion of Story and Mr. Justice WILLIAMS, that detinue can in no case lie for an unredeemed pawn, however much the bailment of it may have been abused, we are not at liberty to apply the *ratio decidendi* in *Johnson v. Stear*, to the case before us.

It raises a strong presumption against the defence set up in this plea, that nothing bearing the slightest resemblance to the right of possession, which it claims for the assignee of a pawnee, is to be

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found in the copious title of the Digest (Dig. lib. xx. tit. 1), "De pignoribus et hypothecis; et qualiter ea contrahantur, et de pactis eorum," or in the five following titles of the contract of pawn and hypothec and its incidents, or in the title "De pigneratitiâ actione, vel contrâ" (Dig. lib. xiii. tit. 7), or in the works of any English, French, or Scotch jurist.

The *dictum* of the majority of the Court in the case of *Mores v. Conham*, Owen, 123, 124, that the pawnee has such an interest in the pawn as he may assign over, was not the point decided in that case; nor, as it seems to me, a point essential to its decision; the point decided being, that the surrender by the plaintiff of a chattel pawned to him by a third person was a good consideration for a promise by the defendant to pay the debt for which it had been given as security. It does not seem to follow from that decision that the surrenderee thereby acquired such an interest in the pawn as would enable him to defend an action of detinue at the suit of the true owner, the reunion of whose rights of property and

possession was, unless they meant to rob him, the real [*603] object of the transaction. The *inference, drawn from

this very obscure and superficially reasoned case in favour of the defendant's plea, is wholly irreconcilable with the doctrine of Domat, the highest authority on all questions depending, as this question does, upon the rules and principles of the Roman civil law, that the bailments of "*hypothèque*" and "gage" last only as long as the thing hypothecated is in the hands of the person charging it, or the thing pawned in the hands of him who takes it for his security (Domat, *Lois Civiles*, liv. iii. tit. 1, s. 1), and with the doctrine of Erskine, a jurist of nearly equal eminence, that "in a pledge of moveables the creditor who quits the possession of the subject loses the real right he had upon it." (*Institute of the Laws of Scotland*, b. iii. tit. 1, s. 33.)

I think that the bailment to Simpson was determined by the pledge by him to the defendant under the circumstances stated in the plea: that both of them have been guilty of a conversion: that the plaintiff might, as Mr. Justice WILLIAMS said in the case of *Johnson v. Stear*, 15 C. B. (N. S.) at p. 341, 33 L. J. C. P. at p. 124, lawfully, should the opportunity offer, resume the possession of the debentures, and hold them freed from the bailment; and may, the defendant being remitted to his remedy against Simpson, and Simpson to his remedy upon the bill, recover them, or their

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full value, if they cannot be delivered to him, in this action of detinue.

MELLOR, J. [After stating the declaration and plea.] — To this plea the plaintiff demurred, and upon demurrer, I think that we must assume that the pledging of the debentures by Simpson to the defendant took place before default was made by the plaintiff in payment of the bill of exchange at maturity, and that we must also assume that the money for which the debentures were pledged by Simpson, as a security to the defendant, was of larger amount than the amount of the bill of exchange discounted for the plaintiff by Simpson. The question thus raised by this plea is, whether a pawnee of debentures, deposited with him as a security for the due payment of money at a certain time, does, by repledging such debentures and depositing them with a third person as a security for a larger amount, before any default in payment by the pawnor, * make void the contract upon which they were [* 604] deposited with the pawnee, so as to vest in the pawnor an immediate right to the possession thereof, notwithstanding that the debt due by him to the original pawnee remains unpaid. If the affirmative of this proposition be maintained, the result seems *primâ facie* to be disproportionate to any injury which the pawnor would be likely to sustain from the fact of his debentures having been repledged before default made. Still, if the principles of law, as laid down in decided cases, satisfactorily support the proposition above stated, this Court must give effect to them. There is a well recognised distinction between a lien and a pledge, as regards the powers of a person entitled to a lien and the powers of the person who holds goods upon an agreement of deposit by way of pawn or pledge for the due payment of money. In the case of simple lien there can be no power of sale or disposition of the goods, which is inconsistent with the retention of the possession by the person entitled to the lien; whereas, in the case of a pledge or pawn of goods, to secure the payment of money at a certain day, on default by the pawnor, the pawnee may sell the goods deposited and realise the amount, and become a trustee for the overplus for the pawnor; or, even if no day of payment be named, he may, upon waiting a reasonable time, and taking the proper steps, realise his debt in like manner. It is said by Mr. Justice Story (On Bailments, tit. Pawns or Pledges, sect. 311), that “The foundation of the distinc-

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tion rests in this, that the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation; but, in the case of a lien, nothing is supposed to be given but a right of retention or detainer, unless under special circumstances." The question thus arises, is the right of retention in case of a lien, either by a custom or contract, otherwise different from a deposit, by way of pledge for securing the due payment of money, than in the incidental power of sale in the latter case on condition broken? In other words, on a contract of pledge, is it implied that the pledgee shall not part with the possession of the thing pledged until default in payment; and, if so, is that of the essence of the contract, so that the violation of it makes void the contract?

In the case of *Legg v. Evans*, 6 M. & W. 36, 41, an [*605] action of trover having * been brought against the defendants, as sheriff of Middlesex, to recover the value of some pictures and picture frames, the defendants justified under an execution against the goods and chattels of the plaintiff, to which the plaintiff replied setting up a lien in respect of work done upon such goods and chattels, which had been delivered to him in the way of his trade by one Williams, and further set up an agreement between the plaintiff and Williams, that the plaintiff should draw and indorse certain bills of exchange for the use of Williams, and should have a right to hold the said goods for securing the payment by Williams of the amount of the said bills of exchange; and he alleged that the said money and bills of exchange then remained wholly unpaid. The Court of Exchequer held, on demurrer to the replication, that it was a good answer to the plea; and PARKE, B., is reported to have said: "If we consider the nature of a lien and the right which it confers, it will be evident that it cannot form the subject-matter of a sale. A lien is a personal right which cannot be parted with, and continues only so long as the possessor holds the goods. It is clear, therefore, that the sheriff cannot sell an interest of this description, which is a personal interest in the goods:" and farther on he said: "Here the interest cannot be transferred to any other individual, it continues only as long as the holder keeps possession of the subject-matter of the lien, either by himself or his servant." In that case there was superadded to the lien in respect of work done an agreement that the person entitled to the lien should have a right to hold the said goods and chattels for securing the payment

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of the bills of exchange therein mentioned, and which then remained wholly unpaid. That case was treated as a simple case of lien or right "to hold," to secure the payment, not only of the amount due for work done on the goods by Williams, but also of the bills drawn and indorsed by him. It is, therefore, an authority to the effect that in the case of lien, even to secure payment of money advanced, there is no implication of any power to sell or otherwise dispose of the subject-matter of the lien, because retention of possession by the party entitled to the lien is an essential ingredient in it.

It appears, therefore, that there is a real distinction between a deposit by way of pledge for securing the payment of money, and * a right to hold by way of lien to secure the [* 606] same object. In *Pothonier v. Dawson*, Holt, N. P. at p. 385, cited in argument in *Legg v. Evans*, 6 M. & W. at p. 40, GIBBS, Ch. J., said: "Undoubtedly, as a general proposition a right of lien gives no right to sell the goods. But when goods are deposited by way of security, to indemnify a party against a loan of money, it is more than a pledge.¹ The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade."

It appears to me that considerable confusion has been introduced into this subject by the somewhat indiscriminate use of the words "special property," as alike applicable to the right of personal retention in case of a lien, and the actual interest in the goods created by the contract of pledge to secure the payment of money. In *Legg v. Evans*, 6 M. & W. at p. 42, the nature of a lien is defined to be a "personal right which cannot be parted with;" but "the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation." Story on Bailments, sect. 311. In each case the general property remains in the pawnor; but the question is, as to the nature and extent of the interest, or special property, passing to the bailee, in the two cases. Mr. Justice Story, in his Treatise on Bailments, sect. 324, thus describes the right and interest of the pawnee: "He may, by the common law, deliver over the pawn into the hands of a stranger for safe custody, without consideration, or he may sell or assign all his interest in the pawn, or he may convey the same interest, conditionally, by way of pawn, to another person, without

¹ *Quere*, whether "pledge" should not be read "lien."

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in either case destroying or invalidating his security: but if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor as if he were the absolute owner, it is clear that in such a case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee. The only question is, whether the creditor should be entitled to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in [* 607] the "same manner as in the case of a naked tort, without any qualified right in the first pawnee."

In *M'Combie v. Davies*, 7 East, 5, see pp. 6 and 7, it appeared that a broker had for a debt of his own pledged with the defendant certain tobacco of his principal's, upon which he had a lien, and in an action brought by the principal against the defendant in trover for the tobacco, Lord ELLENBOROUGH being of opinion "that the lien was personal and could not be transferred by the tortious act of the broker pledging the goods of his principal," the plaintiff obtained a verdict; and upon motion for a new trial Lord ELLENBOROUGH said that "nothing could be clearer than that liens were personal, and could not be transferred to third persons by any tortious pledge of the principal's goods;" but he afterwards added "that he would have it fully understood that his observations were applied to a tortious transfer of the goods of the principal by the broker undertaking to pledge them as his own, and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of the goods, on which he has the lien, to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him."

It would, therefore, seem that in the case of a broker or factor for sale, before the Factors Acts, although he had no power to pledge his principal's goods, except to the extent of his own lien, with notice of the extent of his interest, yet where he pledged the goods on which he had a lien tortiously, neither the factor nor his pawnee could retain them even for the payment of the amount of the original lien. The case of *M'Combie v. Davies* shows that the factor's or broker's lien, although simply a right to retain possession as between him and his principal, might be transferred and made a security to a third person, provided he professed to assign

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it only as a security to the like amount as that due to himself. Still the character of the transaction is that of lien, and not of deposit by way of pledge; and although the goods were entrusted to the broker for sale, and up to the time of sale remained in his hands upon a personal right to retain them for advances, yet he could not pledge them, and if he did, the act was an essential violation * of the relation betwixt him and his [* 608] principal, and entitled the latter at once to the recovery of the value of the goods in trover. "But the relation of principal and factor, where money has been advanced on goods consigned for sale, is not that of pawnor and pawnee," as was said by the Court in *Smart v. Sanders*, 3 C. B. at pp. 400-401 (and see s. c. after amendment of pleadings, 5 C. B. at p. 917).

There would therefore appear to be some real difference in the incidents between a simple lien, like that in *Legg v. Evans*, 6 M. & W. 36, and the lien of a broker or factor before the Factors Act, and the case of a deposit by way of pledge to secure the repayment of money, which latter more nearly resembles an ordinary mortgage, except that the pawnor retains the general property in the goods pledged which the mortgagor does not in the case of an ordinary mortgage. (Notes to *Coggs v. Bernard*, 1 Smith's L. C. 194, 5th ed.) A lien, as we have seen, gives only a personal right to retain possession. A factor's or broker's lien was apparently attended with the additional incident, that to the extent of his lien he might transfer even the possession of the subject-matter of the lien to a third person, "appointing him as his servant to keep possession for him." In a contract of pledge for securing the payment of money, we have seen that the pawnee may sell and transfer the thing pledged on condition broken; but what implied condition is there that the pledgee shall not in the meantime part with the possession thereof to the extent of his interest? It may be that upon a deposit by way of pledge, the express contract between the parties may operate so as to make a parting with the possession, even to the extent of his interest, before condition broken, so essential a violation of it as to revest the right of possession in the pawnor; but in the absence of such terms, why are they to be implied? There may possibly be cases in which the very nature of the thing deposited might induce a jury to believe and find that it was deposited on the understanding that the possession should not be parted with; but in the case before

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us we have only to deal with the agreement which is stated in the plea. The object of the deposit is to secure the repayment of a loan, and the effect is to create an interest and a right of property in the pawnee, to the extent of the loan, in the goods [* 609] deposited; but what is the authority for *saying that until condition broken the pawnee has only a personal right to retain the goods in his own possession?

In *Johnson v. Stear*, 15 C. B. (N. S.) 330, 33 L. J. C. P. 130, one Cumming, a bankrupt, had deposited with the defendant 243 cases of brandy, to be held by him as a security for the payment of an acceptance of the bankrupt for £62 10s., discounted by the defendant, and which would become due January 29, 1863, and in case such acceptance was not paid at maturity, the defendant was to be at liberty to sell the brandy and apply the proceeds in payment of the acceptance. On the 28th January, before the acceptance became due, the defendant contracted to sell the brandy to a third person, and on the 29th delivered to him the dock warrant, and on the 30th such third person obtained actual possession of the brandy. In an action of trover, brought by the assignee of the bankrupt, the Court of Common Pleas held that the plaintiff was entitled to recover, on the ground that the defendant wrongfully assumed to be owner, in selling; and although that alone might not be a conversion, yet, by delivering over the dock warrant to the vendee in pursuance of such sale, he "interfered with the right which the bankrupt had on the 29th if he repaid the loan;" but the majority of the Court (ERLE, Ch. J., BYLES and KEATING, JJ.) held that the plaintiff was only entitled to nominal damages, on the express ground, "that the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created an interest and a right of property in the goods, which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract." (See 15 C. B. (N. S.) at pp. 334-335, 33 L. J. C. P. at p. 131.) From that view of the law, as applied to the circumstances of that case, Mr. Justice WILLIAMS dissented, on the ground "that the bailment was terminated by the sale before the stipulated time, and consequently that the title of the plaintiff to the goods became as free as if the bailment had never taken place." (See 15 C. B. (N. S.) at p. 340, 33

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L. J. C. P. at p. 134.) Although the dissent of that most learned Judge diminishes the authority of that case as a decision on the point, and *although it may be open to doubt [* 610] whether in an action of trover the defendant ought not to have succeeded on the plea of not possessed, and whether the plaintiff's only remedy for damages was not by action on the contract, I am nevertheless of opinion that the substantial ground upon which the majority of the Court proceeded, viz., that the "act of the pawnee did not annihilate the contract, nor the interest of the pawnee in the goods," is the more consistent with the nature and incidents of a deposit by way of pledge. I think that when the true distinction between the case of a deposit, by way of pledge, of goods, for securing the payment of money, and all cases of lien, correctly so described, is considered, it will be seen that in the former there is no implication, in general, of a contract by the pledgee to retain the personal possession of the goods deposited; and I think that, although he cannot confer upon any third person a better title or a greater interest than he possesses, yet, if nevertheless he does pledge the goods to a third person for a greater interest than he possesses, such an act does not annihilate the contract of pledge between himself and the pawnor; but that the transaction is simply inoperative as against the original pawnor, who upon tender of the sum secured immediately becomes entitled to the possession of the goods, and can recover in an action for any special damage which he may have sustained by reason of the act of the pawnee in repledging the goods; and I think that such is the true effect of Lord HOLT's definition of a "*radium* or pawn" in *Coggs v. Bernard*, 2 Ld. Raym. at pp. 916-917; although he was of opinion that the pawnee could in no case use the pledge if it would thereby be damaged, and must use due diligence in the keeping of it, and says that the creditor is bound to restore the pledge upon payment of the debt, because, by detaining it after the tender of the money, he is a wrongdoer, his special property being determined; yet he nowhere says that the misuse or abuse of the pledge before payment or tender annihilates the contract upon which the deposit took place.

If the true distinction between cases of lien and cases of deposit by way of pledge be kept in mind, it will, I think, suffice to determine this case in favour of the defendant, seeing that no tender of the sum secured by the original deposit is alleged to have

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[* 611] been * made by the plaintiff; and considering the nature of the things deposited, I think that the plaintiff can have sustained no real damage by the repledging of them, and that he cannot successfully claim the immediate right to the possession of the debentures in question.

I am therefore of opinion that our judgment should be for the defendant.

BLACKBURN, J. [After stating the pleadings.]—The plea does not expressly state whether the deposit with the defendant by Simpson was before or after the dishonour of the bill of exchange; and as against the defendant, in whose knowledge this matter lies, it must be taken that it was before the bill was dishonoured, and consequently at a time when Simpson was not yet entitled by virtue of his agreement with the plaintiff to dispose of the debentures. We cannot construe the plea as stating that Simpson agreed to transfer to the defendant, as indorsee of the bill, the security which Simpson had over the debentures, and no more. We must, I think, as against the defendant, construe the plea as stating that Simpson deposited the debentures, professing to give a security on them for repayment of a debt of his own, which may or may not have exceeded the amount of the bill of exchange, but was certainly different from it. And it is quite clear that Simpson could not give the defendant any right to detain the debentures after the bill of exchange was satisfied, so that a replication that the plaintiff had paid, or was ready and willing to pay the bill, would have been good. The defendant could not in any view have a greater right than Simpson had. But there is no such replication; and so the question which is raised on this record, and it is a very important one, is, whether the plaintiff is entitled to recover in detinue the possession of the debentures, he neither having paid nor tendered the amount for which he had pledged them with Simpson. In detinue the plaintiff's claim is based upon his right to have the chattel itself delivered to him; and if there still remain in Simpson, or in the defendant as his assignee, any interest in the goods, or any right of detention inconsistent with this right in the plaintiff, the plaintiff must fail in detinue, though he may be entitled to maintain an action of tort against [* 612] * Simpson or the defendant for the damage, if any, sustained by him in consequence of their unauthorised dealing with the debentures.

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The question, therefore, raised on the present demurrer is, whether the deposit by Simpson of the debentures with the defendant, as stated in the plea, put an end to that interest and right of detention till the bill of exchange was honoured, which had been given to Simpson by the plaintiff's original contract of pledge with him.

There is a great difference in this respect between a pledge and a lien. The authorities are clear that a right of lien, properly so called, is a mere personal right of detention; and that an unauthorised transfer of the thing does not transfer that personal right. The cases which established that, before the Factors Acts, a pledge by a factor gave his pledgee no right to retain the goods, even to the extent to which the factor was in advance, proceed on this ground. In *Doubiquay v. Dural*, 5 T. R. at p. 606, BULLER, J., puts the case on the ground that, "a lien is a personal right and cannot be transferred to another." In *M'Combie v. Davies*, 7 East, at p. 6, Lord ELLENBOROUGH puts the decision of the Court on the same ground, saying that "nothing could be clearer than that liens were personal and could not be transferred to third persons by any tortious pledge of the principal's goods." STORY, in his Treatise on Bailments, sects. 325, 326, and 327, is apparently dissatisfied with these decisions, thinking that a factor, who has made advances on the goods consigned to him, ought to be considered as having more than a mere personal right to detain the goods, and that a pledgee from him ought to have been considered entitled to detain the goods until the lien of the factor was discharged. This is a question which can never be raised in this country, for the Legislature has intervened, and in all cases of pledges by agents, within the Factors Acts, the pledge is now available to the extent of the factor's interest.

But, on the facts stated on the plea, Simpson was not an agent within the meaning of the Factors Acts; and we have to consider whether the agreement stated to have been made between the plaintiff and him did confer something beyond a mere lien properly so called, an interest in the property, or real right, as

* distinguished from a mere personal right of detention. [*613]
I think that both in principle and on authority, a contract such as that stated in the plea, pledging goods as a security, and giving the pledgee power in case of default to dispose of the pledge (when accompanied by an actual delivery of the thing), does give

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the pledgee something beyond a mere lien; it creates in him a special property or interest in the thing. By the civil law such a contract did so, though there was no actual delivery of possession; but the right of hypothec is not recognised by the common law. Till possession is given the intended pledgee has only a right of action on the contract, and no interest in the thing itself. *Howes v. Ball*, 7 B. & C. 481 (31 R. R. 256). I mention this because in the argument several authorities, which only go to show that a delivery of possession is, according to the English law, necessary for the creation of the special property of the pawnee, were cited as if they determined that possession was necessary for the continuance of that property.

The effect of the civil law is thus stated by Story, in his Treatise on Bailments, sect. 328: "It enabled the pawnee to assign over, or to pledge the goods again, to the extent of his interest or lien on them; and in either case the transferee was entitled to hold the pawn, until the original owner discharged the debt for which it was pledged. But beyond this, the (second) pledge was inoperative and conveyed no title, according to the known maxim, *nemo plus juris ad aliam transferre potest quam ipse habet*."

In England there are strong authorities that the contract of pledge, when perfected by delivery of possession, creates an interest in the pledge, which interest may be assigned. This was the very point decided by the Court in *Mores v. Conham*, Owen, 123, 124, where the Court say that the pawnee is responsible "if he misuseth the pawn; also he hath such interest in the pawn as he may assign over, and the assignee shall be subject to detain if he detains it upon payment of the money by the owner." It is true that one Judge, FOSTER, J., dissented on this very point. That may so far weaken the authority of the decision; but it shows that there could be no mistake in the reporter, and no oversight on the part of the majority, but that it was a deliberate decision.

It is laid down by Lord HOLT in his celebrated judgment [*614] in **Coygs v. Bernard*, 2 Ld. Raym. at p. 916, that a pawnee "has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him," language certainly seeming to indicate an opinion that he has an interest in the thing, or real right, as distinguished from a mere personal right of detention. And Story, in his Treatise on Bailments, sect. 327, says: "But whatever

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doubt may be indulged as to the case of a factor, it has been decided," that is, in America, "that in case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged."

In Whitaker on Lien, published in 1812, p. 140, the law is laid down to be, that the pawnee has a special property beyond a lien. I do not cite this as an authority of great weight, but as showing that this was an existing opinion in England before Story wrote his treatise. But there is a class of cases in which a person having a limited interest in chattels, either as hirer or lessee of them, dealing tortiously with them, has been held to determine his special interest in the things, so that the owner may maintain trover as if that interest had never been created. But I think in all these cases the act done by the party having the limited interest was wholly inconsistent with the contract under which he had the limited interest; so that it must be taken from his doing it, that he had renounced the contract, which, as was said in *Fenn v. Bittleston*, 7 Ex. at p. 160, 21 L. J. Ex. at p. 43, operates as a disclaimer of a tenancy at common law, or as it is put by WILLIAMS, J., in *Johnson v. Stear*, 15 C. B. (N. S.) 330, 341, 33 L. J. C. P. 130, 134, he may be said to have violated an implied condition of the bailment. Such is the case where a hirer of goods, who is not to have more than the use of them, destroys them or sells them; that being so wholly at variance with the purpose for which he holds them, that it may well be said that he has renounced the contract by which he held them, and so waived and abandoned the limited right which he had under that contract. It may be a question whether it would not have been better if it had been originally determined that, even in such cases, the owner should bring a special action on the case, and recover the damage

* which he actually sustained, which may in such cases [*615] be very trifling, though it may be large, instead of holding that he might bring trover, and recover the whole value of the chattel without any allowance for the special property. But I am not prepared to dissent from these cases, where the act complained of is one wholly repugnant to the holding, as I think it will be found to have been in every one of the cases in which this doctrine has been acted upon. But where the act, though unauthorised, is not so repugnant to the contract as to show a disclaimer, the law is otherwise. Thus, where the hirer of a horse for two days to

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ride from Gravesend to Nettleston deviated from the straight way and rode elsewhere, it was held that the hirer had a good special property for the two days, and although he misbehaved by riding to another place than was intended, that was to be punished by an action on the case, and not by seizing the gelding. *Lee v. Atkinson*, Yelv. 172. This certainly was a much more equitable decision than if a rough rule had been laid down that every deviation from the right line, however small, was to operate as a forfeiture of the right to use the horse for which the hirer had paid; and it may be reconciled to the decisions already referred to, because the wrongful use, though wrongful, was not such as to show a renunciation of the contract with the owner of the horse. Now I think that the subpledging of goods, held in security for money, before the money is due, is not in general so inconsistent with the contract as to amount to a renunciation of that contract. There may be cases in which the pledgor has a special personal confidence in the pawnee, and therefore stipulates that the pledge shall be kept by him alone, but no such terms are stated here, and I do not think that any such term is implied by law. In general all that the pledgor requires is the personal contract of the pledgee that on bringing the money the pawn shall be given up to him, and that in the meantime the pledgee shall be responsible for due care being taken for its safe custody. This may very well be done though there has been a subpledge; at least the plaintiff should try the experiment whether, on bringing the money for which he pledged those debentures to Simpson, he cannot get them. And the assignment of the pawn for the purpose of raising money (so [* 616] * long at least as it purports to transfer no more than the pledgee's interest against the pledgor) is so far from being found in practice to be inconsistent with or repugnant to the contract, that it has been introduced into the Factors Acts, and is in the civil law (and according to *Mores v. Conham*, Owen, 123, in our own law also) a regular incident in a pledge. If it is done too soon, or to too great an extent, it is doubtless unlawful, but not so repugnant to the contract as to be justly held equivalent to a renunciation of it.

The cases of *Bloom v. Sanders*, 4 B. & C. 941, and *Milgate v. Kibbitt*, 3 M. & G. 100, are cases of unpaid vendors, and therefore are not authorities directly applicable to a case of pledge. But the position of a partially unpaid vendor, who irregularly sells

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the goods which have only been partially paid for, is very analogous to that of a pledgee; and in *Milgate v. Kibble*, 3 M. & G. at p. 103, TINDAL, Ch. J., is reported to have used language that seems to indicate that in his opinion a pledgor could not have maintained trover any more than the vendee in that case.

But the latest case, and one which I think is binding on this Court, is that of *Johnson v. Stear*, 15 C. B. (N. S.) 330, 33 L. J. C. P. 130; and I think that the decision of the majority of the Court of Common Pleas in that case is an authority, that at all events there remains in the pawnee an interest, not put an end to by the unauthorised transfer, such as is inconsistent with a right in the pawnor to recover in detinue. In that case the goods had been pledged as a security for a bill of exchange, with a power of sale if the bill was not paid at maturity. The pledgee sold the goods the day before he had a right to do so. The assignees of the bankrupt pledgor brought trover, and sought to recover the full value of the goods without any reduction. WILLIAMS, J., thought that they were so entitled, giving as his reason, "that the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully when so resumed, as the absolute owner against all the world." (15 C. B. (N. S.) at p. 341, 33 L. J. C. P. at p. 134.) And if *this was [*617] correct, the present plaintiff is entitled to judgment. But the majority of the Court decided that "the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties, nor the interest of the pawnee in the goods under that contract." (15 C. B. (N. S.) at pp. 334-335, 33 L. J. C. P. at p. 131.) This can be reconciled with the cases above cited, of which *Fenn v. Bittleston*, 7 Ex. 152, 21 L. J. Ex. 41. is one, by the distinction that the sale, though wrongful, was not so inconsistent with the object of the contract of pledge as to amount to a repudiation of it, though I own that I do not find this distinction in the judgment of *Johnson v. Stear*. It may be that the conclusion from these premises ought to have been, that the defendant was entitled to the verdict, on the plea of not possessed in trover, unless the Court thought fit to let the

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plaintiff, on proper terms, amend by substituting a count for the improper sale; but this point as to the pleading does not seem to have been presented to the Court of Common Pleas. The fact that they differed from WILLIAMS, J., shows that after consideration they meant to decide, that the pledge gave a special property, which still continued; and though I have the highest respect for the authority of WILLIAMS, J., I think we must, in a Court of co-ordinate jurisdiction, act upon the opinion of the majority, even if I did not think, as I do, that it puts the law on a just and convenient ground. And as already intimated, I think that unless the plaintiff is entitled to the uncontrolled possession of the things, he cannot recover in detinue.

For these reasons, I think we should give judgment for the defendant.

MELLOR, J., read the judgment of

COCKBURN, Ch. J. — The question in this case is, whether, when debentures have been deposited as security for the payment of a bill of exchange, with a right on the part of the deposittee [* 618] to sell * or otherwise dispose of the debentures in the event of nonpayment of the bill, — in other words, as a pledge, — and the pawnee pledges the securities to a third party on an advance of money, the original pawnor, the bill of exchange remaining unpaid, can treat the contract between himself and the first pawnee as at an end, and, without either paying or tendering the amount of the bill of exchange, for the payment of which the security had been pledged, bring an action of detinue to recover the thing pledged from the holder to whom it has been transferred.

I think it unnecessary to the decision in the present case to determine whether a party, with whom an article has been pledged as a security for the payment of money, has a right to transfer his interest in the thing pledged (subject to the right of redemption in the pawnor) to a third party. I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee seems quite inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given. In some instances it may well be inferred from the nature of the thing pledged, — as in the case of a valuable work of art, — that the

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pawnor, though perfectly willing that the article should be entrusted to the custody of the pawnee, would not have parted with it on the terms that it should be passed on to others and committed to the custody of strangers. It is not, however, necessary to decide this question in the present case. The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged without payment of the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action, — for nominal damages if he has sustained no substantial damage; for substantial damages, if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged. We are not dealing with a case of lien, which is merely the right to retain possession of the chattel, and which right is immediately lost on the possession *being parted with, unless to a person who may [* 619] be considered as the agent of the party having the lien for the purpose of its custody. In the contract of pledge, the pawnor invests the pawnee with much more than the mere right of possession. He invests him with a right to deal with the thing pledged as his own, if the debt be not paid and the thing redeemed at the appointed time.

It seems to me that the contract continues in force, and with it the special property created by it, until the thing pledged is redeemed or sold at the time specified. The pawnor cannot treat the contract as at an end, until he has done that which alone enables him to divest the pawnee of the inchoate right of property in the thing pledged, which the contract has conferred on him.

The view which I have taken of this case, and which I should have arrived at independently of authority, is fully borne out by the decision of the majority of the Court of Common Pleas in the case of *Johnson v. Stear*, 15 C. B. (N.S.) 330, 33 L. J. C. P. 130. There, goods, which had been pledged as security for the payment of a bill of exchange, having been sold before the falling due of the bill, the Court held, on an action of trover being brought to recover the goods, that, although the owner was entitled to maintain an action against the pawnee for a breach of contract in part-

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ing with the goods, yet that the contract itself was not put an end to by the tortious dealing with the goods by the pawnee, so as to entitle the owner to bring an action to recover the goods as if the contract never had existed. This decision appears to me to be a direct authority on the present case, and to be binding upon us. It is true that Mr. Justice WILLIAMS dissented from the other three Judges constituting the Court, holding that the contract was put an end to, and the plaintiff remitted to his absolute right of ownership by the conversion of the goods by the pawnee. But however I may regret to differ from that very learned Judge, I concur, for the reasons I have given, with the majority of the Court of Common Pleas in holding, that a pawnor cannot recover back goods (and the same principle obviously would apply to debentures) pledged as security for the payment of a debt or [* 620] bill of exchange, until he has paid or tendered the amount of the debt.

I am therefore of opinion that our judgment should be in favour of the defendant.

Judgment for the defendant.

ENGLISH NOTES.

The decision in the ruling case was followed in the Exchequer Chamber on an appeal from the Court of Exchequer, in *Halliday v. Holgate* (1868), L. R. 3 Ex. 299, 37 L. J. Ex. 174, 17 W. R. 13. A holder of scrip certificates for shares borrowed of the defendant a sum of money on his own promissory note, payable on demand, and on the security of the shares, and deposited with the defendant the scrip certificates. He became bankrupt, and the defendant, without demand and without notice, sold enough of the shares to pay his debt. On an action for conversion brought by the assignee in bankruptcy, the Court affirmed the decision of the Court of Exchequer, that the plaintiff was not entitled to even nominal damages. "We cannot," the Court said in the judgment delivered by WILLES, J. [L. R. 3 Ex. 302, 303], "arrive at the conclusion that he is so entitled (*i. e.* to nominal damages) without getting rid of the case of *Donald v. Sackling*; and so far from feeling disposed to overrule that case, we are satisfied of its good sense, and think that it puts the whole matter on a plain and intelligible footing. There are three kinds of security: the first, a simple lien; the second, a mortgage, passing the property out and out; the third, a security intermediate between a lien and a mortgage, — viz., a pledge — where by contract a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as

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is necessary to secure the debt. It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest. If he deals with it in a manner other than is allowed by law for the payment of his debt, then, in so far as by disposing of the reversionary interest of the pledgor he causes to the pledgor any difficulty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor. But it is a contradiction in fact, and would be to call a thing that which it is not, to say that the pledgee consents by his act to re-vest in the pledgor the immediate interest or right in the pledge, which, by the bargain, is out of the pledgor and in the pledgee. Therefore, for any such wrong, an action of trover or of detinue, each of which assumes an immediate right to possession in the plaintiff, is not maintainable, for that right clearly is not in the plaintiff."

AMERICAN NOTES.

The interest of a pledgee in the goods pledged is assignable. He may transfer his entire interest, or may pledge it for a debt of his own, without destroying the original lien. *Brittan v. Oakland Bank of Savings*, 57 Pacific Reporter, 84 (Cal. 1899); *Belden v. Perkins*, 78 Illinois, 449, 454; *Bradley v. Parks*, 83 Illinois, 169; *Jarvis v. Rogers*, 15 Massachusetts, 389; *Drake v. Cloonan*, 99 Michigan, 121; *Goss v. Emerson*, 23 New Hampshire, 38; *Bailey v. Colby*, 34 New Hampshire, 29, 35; *Thompson v. Patrick*, 4 Watts (Penn.), 414; *National Bank of Pulaski v. Winston*, 5 Baxter (Tenn.), 685; Story on Bailments, 9th ed. sect. 324; Jones on Pledges, sect. 418.

In *Jarvis v. Rogers*, *supra*, at p. 408, JACKSON, J., said, "From these cases, it appears that the pawnee may deliver the goods to a stranger without consideration, or he may sell and assign all his interest absolutely, or he may assign it conditionally by way of pawn, — without, in either case, destroying the original lien, or giving to the owner a right to reclaim them on any other or better terms than he could have done before such delivery or assignment."

Though the pledgee's interest is assignable, he cannot rightfully sell the goods outright, except in accordance with the terms of the pledge, nor re-pledge them for a sum larger than the debt for which they were originally pledged. Upon the question as to whether, in case the pledgee undertakes so to sell or re-pledge the goods, his lien is at once lost, so that the pledgor can maintain an action for the conversion, or replevy the goods, without payment or tender of the amount due, from him, there is a lack of harmony in the American decisions. In some jurisdictions *Donald v. Suckling* has been cited with approval, and followed. Thus, in *Talty v. Freedman's Savings & Trust Co.*, 93 United States, 321, where a pledgee sold the goods to a bona fide purchaser who had no notice of any claim on the part of the pledgor, it was held that the latter was not entitled to replevy the goods from the

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purchaser without first tendering the amount for which the goods had been pledged by him.

And in *Reardon v. Patterson*, 19 Montana, 231, it was held that, in case of a wrongful sale by a pledgee, the pledgor cannot maintain an action for conversion without tendering the amount of the debt. See also *First National Bank of Louisville v. Boyce*, 78 Kentucky, 42.

That a wrongful sale of pledged goods is not necessarily a conversion without any action on the part of the pledgor, so as to require the damages to be the value of the goods at the time of the sale, was held in *Hopper v. Smith*, 63 Howard's Practice Rep. (N. Y.), 34. The Court cited *Donald v. Suckling* and *Halliday v. Holgate*, and said, on p. 38: "Outside of authority, the rule that a sale by the pledgee is not *ipso facto* a conversion seems to be good sense. The rights of the parties are based upon the contract. The sale by the pledgee is wrongful. If that sale in and of itself determines the contract without more, then the pledgee, by his wrongful act, may rescind his contract in spite of the wish of the other party to it. I am not aware of any other case in which this can be done, and I can conceive of no reason for permitting it in this case. It may be for the interest of the pledgor to keep his contract alive, and, if it is so, I cannot see why he may not do it. The maxim that no one shall take any advantage by his own wrongful act, may fairly apply to this case, and we may hold that although the unlawful sale does not *per se* operate as a conversion, yet the pledgor may, at his option, so consider it, and that he may regard the contract as at an end, tender or offer to pay his debt and demand his pledge, or may sue for damages for the sale."

On the other hand, it has been held in several cases that a wrongful sale, or a re-pledge of the goods for a larger amount than the original debt, of itself terminates the lien, and entitles the pledgor to maintain an action for the conversion of the goods without a tender of his debt: in which action, it has generally been held, the defendant may recoup the amount of the debt. See *Rosenzweig v. Frazer*, 82 Indiana, 342; *Freige v. Burt*, 77 Northwestern Rep. 928 (Mich. 1898); *Stearns v. Marsh*, 4 Denio (N. Y.), 227; *Read v. Lambert*, 10 Abbott's Practice Rep. New Series (N. Y.), 428, 434; *Smith v. Savin*, 69 Hun, 311; 141 New York, 315; *Sheridan v. Presas*, 41 New York Supplement, 451; *Neiler v. Kelley*, 69 Pennsylvania State, 403; *Work v. Bennett*, 70 Pennsylvania State, 484.

So, in the late cases of *Waring v. Gaskill*, 95 Georgia, 731, and *Richardson v. Ashby*, 132 Missouri, 238, it was held that, in an action for the debt, brought by the pledgee, the pledgor may recoup his damages for a conversion of the pledge by sale or re-pledge, although he has not tendered payment.

In *Neiler v. Kelley*, *supra*, the Court said that, had the action been replevin, the lack of a tender would have been fatal to the plaintiff's case. But *Sheridan v. Presas*, *supra*, was an action of replevin, and the pledgor succeeded without a tender.

In *Wilson v. Little*, 2 New York, 443, an action on the case for the damage resulting from a wrongful sale of the pledged goods, was held maintainable without tender. See also *Post v. Union National Bank*, 159 Illinois, 421.

On the general question, see Jones on Pledges, sects. 571-580; and notes in 9 Harvard Law Review, 289, 540.

POOR.

No. 1. — **REX v. MUNDAY.**

(1718.)

RULE.

THE liability to maintain poor relations under the Poor Relief Act, 1601 (43 Eliz. c. 2), sect. 6, applies to blood relations only.

Rex v. Munday.

1 Strange, 190.

Poor. — Liability to Maintain.

A man is not bound to maintain his wife's mother.

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Order, reciting that Munday had a good fortune with his wife, and that her mother was poor, therefore he is ordered to provide for her. And in maintenance of the order 1 Bulst. — and 2 Bulst. 345, Styles, 283, were cited. *Et per* PRATT, Ch. J. — On consideration, we are all of opinion, that the son-in-law is not bound, either within the words or intent of the statute, which provides only for natural parents. By the law of nature a man was bound to take care of his own father and mother; but there being no temporal obligation to enforce that law of nature, it was found necessary to establish it by Act of Parliament, and that can be extended no farther than the law of nature went before, and the law of nature does not reach to this case. As to the case in 1 Bulst., it is plain the word “not” was left out only by mistake, for the sense of the clause leads you to read it “not obliged,” and besides the Judges were divided. The case indeed in 2 Bulst. is an authority in point as far as it will go, but that is no judicial authority, only a case at a Judge's chamber. The same was also said *obiter* in the case of *Reg. v. Fane*, Pasch. 10 Ann., but it never came judicially before the whole Court till now. And therefore as it is *res integra*, we are of opinion the order must be quashed.

 No. 1. — *Rex v. Munday*. — Notes.

ENGLISH NOTES.

The following note is subjoined to the report in Nolan's (3rd) edition of Strange's reports: "That the statute does not oblige the maintenance of any relation who is out of the line of consanguinity, *vide Rex v. Benoit*, 2 Ld. Raym. 1454; *Rex v. Kempson* (or *Dempsen*) 1 Bott. G. Const. 324, pl. 410 (2 Str. 955); *Woodford and Littleburn*, id. pl. 411, and *Tabb v. Harrison*, 4 T. R. 118, in which last it is stated by Lord KENYON that it appeared from the record of this case (*Rex v. Munday*, not *Munden*, as it is named in Strange's report) that the wife was alive when the order was made."

In *Rex v. Cornish* (1831), 2 B. & Ad. 498, 36 R. R. 639, an order of justices upon a grandfather to pay a weekly sum for the support of his grandchildren was held good, although it did not appear by the order that the father was either dead or unable to maintain the children. LITTLEDALE, J., considered, that the statute gives the justices a discretionary power which they might exercise according to the circumstances of the parties: and all the Judges held that the magistrates were not bound to state in the order that the father was either dead or unable.

By the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), sect. 36, the jurisdiction to make the order is vested in the justices of the peace having jurisdiction in the union or parish to which the poor person in whose behalf the same is made, becomes chargeable; instead of, as by former Acts, the justices having jurisdiction in the place where the persons dwell upon whom the order is made.

AMERICAN NOTES.

Whether or not, in any given jurisdiction, the statute imposing upon kindred the duty of supporting paupers expressly limits the liability to kindred by consanguinity, the American Courts uniformly exonerate relations by affinity. That a husband is not liable for the maintenance of his wife's poor relations was held in *Shearman v. Nichols*, 1 Root (Conn.), 250; *Nichols v. Sherman*, id. 361; *Newtown v. Danbury*, 3 Connecticut, 553; *Farr v. Flood*, 11 Cushing (Mass.), 24; *Brookfield v. Warren*, 128 Massachusetts, 287; *Commissioners v. Gansett*, 2 Bailey (S. C.), 320.

See a note in 64 American Decisions, 279.

No. 2. — **Flannagan v. Bishopwearmouth**, 27 L. J. M. C. 46. Rule.

No. 2. — **FLANNAGAN v. BISHOPWEARMOUTH**
(OVERSEERS OF).

(1857).

No. 3. — **THOMAS v. ALSOP**.

(1870.)

RULE.

A HUSBAND who is willing to maintain his wife, if she will live with him, is not guilty under the Vagrant Act (5 Geo. IV. c. 83), sect. 3, of wilful refusal or neglect to maintain her: but, under the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), sect. 33, the justices have jurisdiction, notwithstanding the husband's offer so to maintain the wife, to make an order upon him in a case of proved ill-usage, to pay for her maintenance separately.

Flannagan v. Bishopwearmouth (Overseers of).

27 L. J. M. C. 46-48 (s. c. 8 Ell. & Bl. 451).

*Vagrant Act (5 Geo. IV. c. 83). — Evidence of Wilful Refusal, &c. — In- [46]
valid Conviction. — Case from Petty Sessions.*

The appellant having been summoned before justices under the Vagrant Act, upon the charge of wilfully refusing or neglecting to maintain his wife, repaid the parish officers the sum they had advanced to his wife, and undertook to pay her 12s. a week for her future support. This allowance the appellant did not pay, and he was a second time brought before justices on a similar charge. On the hearing, the appellant offered to maintain his wife if she would come and live with him, but this she refused to do, alleging that he had assaulted her and ill-used her, and that she was afraid to live with him. This the appellant denied, and expressed his willingness to repay any sums already advanced to her by the parish officers and to pay the costs of the hearing, but he declared himself not liable to pay any future advances, as he was willing to provide a house for his wife to live with him in, and he would undertake to treat her kindly and properly. The justices convicted the appellant of the offence charged: — *Held*, upon a case stated from the Petty Sessions, under the 20 & 21 Vict. c. 43, that the facts did not show that the appellant had been guilty of a wilful refusal or neglect within the Vagrant Act (5 Geo. IV. c. 83), and that the conviction, therefore, was invalid.

This was a case stated, by justices at Petty Sessions, under the Act, 20 & 21 Vict. c. 43, for the opinion of this Court.

CASE.

At the police Court of Bishopwearmouth, in the said borough, before the undersigned, two of Her Majesty's justices of the peace, for the said borough, on the 10th of September, 1857, Benjamin Flannagan was charged, under the 5 Geo. IV. c. 83, s. 3, for wilfully refusing or neglecting to maintain his wife, whereby she had become chargeable to the parish of Bishopwearmouth. The overseer of Bishopwearmouth proved that the wife of the defendant had applied to him for relief, and that he had advanced to her the sum of 1s. for that purpose. The wife of the defendant proved that she had received no money from the defendant for several weeks, and had been compelled to apply for relief to the parish, as her mother was unwilling to be burdened with her support. On cross-examination, by the defendant, she admitted that she was living with her mother, who kept a small shop, whereby her mother supported herself and her three children, who lived with her in the same house. It was also in evidence before the said magistrates, that the defendant had been summoned on a similar charge a few weeks previously, when the defendant repaid the parish officer the sum of 1s. then advanced (it being usual with the parish officers to relieve with a small sum with a view to bring the husband before the justices). The defendant also paid the costs incurred, and undertook to pay the sum of 12s. a week to his wife for her future support, but the defendant, though of sufficient ability, never made a single payment to his wife of such weekly allowance or any other payment whatever. On the hearing, the defendant, by his attorney, denied that he had wilfully refused or neglected to maintain his wife, and urged that the advance made by the overseer to his wife was but colourable, and preferred to maintain his wife if she would leave her mother's house (where, however, he himself in the first instance took her and for some time lived with her), and would come and live with him, but he admitted he had no house of his own to reside in, he staying, when not at sea, with his father. This his wife refused to do, alleging that he had assaulted her and used her very ill, without the slightest cause, and that she was afraid to live with her husband alone, on account of such ill-usage. Though the defendant denied this, the magistrates were satisfied he had been guilty of ill-usage. No other proof of cruelty was adduced on

No. 2. — Flannagan v. Bishopwearmouth, 27 L. J. M. C. 46, 47.

this hearing, but the same magistrates had, on a former hearing, other and confirmatory evidence of the wife of the ill-usage, and not the slightest imputation on the conduct or character of the wife was, for one moment, suggested *by the de- [*47] fendant to account for his ill-usage. The defendant, through his attorney, at the close of the case for the parish, offered to refund the sum advanced by the parish, and to pay the costs of the present hearing; but gave notice that the defendant would not consider himself liable for future advances, inasmuch as he was willing to provide a house for his wife to live with him and maintain her, and undertaking to treat her kindly and properly. The magistrates, however, being fully satisfied on the evidence produced before them, that the defendant had, for a length of time, neglected to support his wife, who had on this and the former occasion, from inability to support herself, been compelled to apply to the parish for relief; that the defendant was abundantly able to support himself and wife, and to make the payment per week to her before referred to, the neglect of which had caused the present application to the overseers; and, moreover, that he had been guilty of the ill-usage complained of, and that the offer to take her to live with him was only made to screen himself from the consequences of his continued neglect, concurred with the overseers in considering that the defendant's proposals were not such as should induce the parish to forego the prosecution, and, therefore, convicted the defendant of the offence charged, and sentenced him to be committed to the house of correction at Durham for one month. The defendant was, however, the same day liberated, after entering into the requisite recognisance, on having, through his attorney, applied for a case to be stated for the opinion of this Court. And the question for the opinion of the Court was, whether, under the foregoing circumstances, the conviction was right.

Bliss, in support of the conviction. — All the facts necessary to a conviction, under the Vagrant Act, are found in the case. It is for the past offence of neglecting to support his wife. Any subsequent promise could not purge the husband's former conduct, and the case finds expressly that he had refused to maintain his wife, and the Court will not interfere with the finding of the justices in point of fact.

Milward, *contrà*, was not heard.

 No. 2. — *Flannagan v. Bishopwearmouth*, 27 L. J. M. C. 47, 48.

LORD CAMPBELL, Ch. J. — This is a case stated under the recent Act of Parliament, without which we could not have got at the merits of this case. Until that Act passed we had no power to review the decision of justices when acting within their jurisdiction, and in this case they were acting within their jurisdiction. Then the question now before us is, whether, upon the facts as stated, the husband who has promised to make his wife an allowance, and has broken that promise, and at the same time asks her to come and live with him, which she refuses (and I will assume that he has ill-used her in such a manner that if she had proceeded for a separation *à mensâ et thoro* she would have succeeded, and that the husband would have been liable to a person giving her credit for necessaries), is guilty of the offence of wilfully refusing to maintain his wife. I am of opinion that he has not committed any offence, and that the conviction is illegal. An Act has recently passed which contains provisions that will, when the Act is in operation, be found salutary and beneficial. By that Act a judicial separation may be pronounced, and the husband compelled to provide a pecuniary allowance and alimony for his wife; but when this conviction took place no such thing was known as a judicial separation, and until there was a legal separation *à mensâ et thoro* all the rights of the marriage tie existed in full force. Here, the justices seemed to have supposed that, because the wife might have good ground for refusing to return and live with her husband, that rendered him liable to the offence of wilfully refusing to maintain her under the Vagrant Act. But I think that is not so. No past misconduct, however gross, would justify the wife in refusing to go and live with her husband if he wished her to do so. As the law stood, although her apprehensions were well founded, it could not be said that there had been any wilful refusal of the husband to maintain his wife, and the conviction, therefore, must be quashed.

COLERIDGE, J. — I am of the same opinion. The conviction is upon the ground of a wilful refusal and neglect to maintain the wife, and the justices submit to us the question of, whether or not, upon the facts stated, the conviction was right. Now, [*48] *supposing the wife had been very much ill-used indeed, and had reasonable apprehensions of being ill-treated again, that the husband had promised to make her a pecuniary payment

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promptly, and that he had afterwards not paid her any money, nor made any provision for her; is that evidence of a wilful refusal and neglect to maintain his wife within the Vagrant Act? It seems to me not; it was an arrangement substituted for her living with him, and it appears he had made her the offer to return and live with him, which she had refused, and this the justices supposed they might treat, under the circumstances, as a wilful neglect on his part. That, I think, was not a proper conclusion from the facts, and that the conviction, therefore, is invalid.

WIGHTMAN, J. — This is an attempt, it would seem, to enforce a separate maintenance in a case where a husband has refused to make his wife a separate allowance. The whole case shows that he was always ready to support her if she came to live with him, but she insists on her right to be maintained by him, and that she is not bound to return and live with him on account of his ill-usage towards her though he was ready to receive her back. This is an attempt to get a separate maintenance on the ground of ill-usage, and is not a wilful refusal within the meaning of the Vagrant Act; and the conviction, therefore, must be quashed.

Conviction quashed, without costs.

Thomas v. Alsop.

L. R. 5 Q. B. 151-156 (s. c. 39 L. J. M. C. 43; 21 L. T. 715; 18 W. R. 454).

Poor. — Husband and Wife. — Relief to Wife without Husband. Order [151] on Husband towards Wife's Maintenance, under 31 & 32 Vict. c. 122, s. 33. — Offer of Husband to maintain Wife at his House.

By 31 & 32 Vict. c. 122, s. 33, when a married woman requires relief without her husband, the guardians of the union or parish to which she becomes chargeable may apply to justices in Petty Sessions, and the justices may summon the husband to appear before them to show cause why an order should not be made upon him to maintain his wife; and upon his appearance, or on proof of service of the summons, they may, after hearing the wife, or on such other evidence as they may deem sufficient, make an order upon him to pay such sum weekly towards the cost of the relief of the wife as, after consideration of all the circumstances of the case, shall appear to them proper.

A man having been summoned under the above section, it appeared that his wife had left him sixteen years before on account of his ill-usage, from the effects of which she was still suffering; and she had lately received parish relief, and was still chargeable. The husband had not contributed to her support during the separation, but had applied to her to return to

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cohabitation. At the hearing he offered to receive her back at his house, and promised not to ill-use her. But she refused to return on account of the brutality she had previously received. The justices were satisfied by evidence that it was dangerous to the health of the wife to return to cohabitation: and they made an order on the husband to pay a weekly sum towards the relief of the wife:

Held, that the order was rightly made, notwithstanding the husband's offer, as the justices had found, in effect (which was a question for them), that the wife was justified in leaving and refusing to return to the husband's house.

Case stated by justices under 20 & 21 Vict. c. 43.

At a Petty Sessions holden at Newton Abbot, in the county of Devon, on the 27th of July, 1869, the appellant was summoned, on a complaint by the respondent, clerk to the guardians of the Newton Abbot Union, under sect. 33 of 31 & 32 Vict. c. [*152] 122,¹ to * show cause why an order should not be made upon him to maintain his wife, Thirza Thomas, being a married woman, and requiring relief without her husband, and then chargeable to the said union.

Upon the hearing of the complaint both appellant and respondent were personally present, and also appeared by their attorneys.

It was proved on the part of the respondent that Thirza Thomas was married to the appellant on the 7th of August, 1835. She lived with him from the date of marriage to the 17th of March, 1853, when, in consequence of the ill-usage she received from the appellant, she left his house, and lived separate from him, and she was, at the time of the hearing, suffering from the injury she had received from the appellant prior to her separation. She was suffer-

¹ 31 & 32 Vict. c. 122, s. 33: — "When a married woman requires relief without her husband, the guardians of the union or parish, or the overseers of the parish, as the case may be, to which she becomes chargeable, may apply to the justices having jurisdiction in such union or parish, in Petty Sessions assembled, and thereupon such justices may summon such husband to appear before them to show cause why an order should not be made upon him to support his wife; and upon his appearance, or, in the event of his not appearing, upon proof of service of such summons upon him, such justices may, after hearing such wife upon oath, or receiving such other evidence as they may

deem sufficient, make an order upon him to pay such sum, weekly or otherwise, towards the cost of the relief of the wife as, after consideration of all the circumstances of the case, shall appear to them to be proper, and shall determine in such order how and to whom the payments shall from time to time be made, which order shall, if the payments required by it to be made be in arrear, be enforced in the manner prescribed by the Act of 11 & 12 Vict. c. 43, for the enforcing of orders of justices requiring the payment of a sum of money: Provided that such order may be at any future time revoked by the justices in Petty Sessions assembled if they see sufficient cause for so doing."

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ing from uterine disease, from which she had suffered for sixteen years, and after such a long continuance it was now incurable.

The appellant had not contributed to the support of his wife during the separation, but had applied to her to return to cohabitation.

Since the separation Thirza Thomas had exhausted what little means she had, and had been supported by her friends. Her health was bad, her sight not good, and she was now wholly unable to maintain herself, and she required relief; and whilst residing in the parish of Ashburton, within the Newton Abbot Union, she became chargeable to the common fund of the union on the 6th of July, 1869, and was, at the time of the hearing, an inmate of the Newton Abbot Union House, and still chargeable thereto.

The appellant, at the hearing, through his attorney, offered to receive back his wife at his house, and provide for her. She declined to return to the appellant from the brutality she had previously received from him; and medical evidence was called, * and it was proved to the satisfaction of the justices [* 153] that it would be injurious to the health of Thirza Thomas to return to cohabitation with the appellant.

It was contended on the part of the appellant that as Thirza Thomas had, on oath, in the presence of the Court, refused to return back to cohabitation with the appellant, who then again offered a home, and made promise not to ill-use her, the justices had no jurisdiction, and were debarred from making any order on the appellant after such refusal; and the appellant relied on the case of *Flannagan v. Bishopwearmouth* (p. 339, *ante*), which was a case stated on 5 Geo. IV. c. 83, s. 3 (the Vagrant Act), in support of his argument; and argued that, by such refusal to return, Thirza Thomas had no further claim on the appellant, and no payment could be required of the appellant after such declaration of Thirza Thomas.

The justices were of opinion that sect. 33 of 31 & 32 Vict. c. 122, was not affected by the above decision, but provided expressly for cases to which that decision would have previously been applicable; and that, consequently, they had power to make an order on the appellant under the above 33rd section, and they accordingly made an order on the appellant to pay to the relieving officer of the union 7s. a week toward the maintenance of his wife, so long as she should require relief, or until the order was revoked.

The question of law for the opinion of the Court was, whether the justices had jurisdiction to make such an order after the appel-

lant had offered to receive and provide for his wife in manner before stated.

McKellar, for the appellant. — After the offer and readiness of the appellant to receive back and support his wife, the justices had no power to make an order upon him to contribute to her maintenance. *Flannagan v. Bishopscarmouth* (p. 339, *ante*).

[LUSH, J. — That was a decision under 5 Geo. IV. c. 83, that a man, whatever his past misconduct, could not be convicted of wilfully refusing to support his wife if he was ready to maintain her. The present enactment is very different.]

If the husband is ready to support her, she is not “chargeable” to the parish or union.

[* 154] * [COCKBURN, Ch. J. — It is the parish, not the wife, who make the present application; the parish are bound to give relief if the woman “requires it.”]

She is not legally “chargeable” if she has a home to return to, or other means of support. See 4 Burn’s Just. 299; *Rex v. Flintan*, 1 B. & Ad. 227; *Sacceny v. Spooner*, 3 B. & S. 329, 32 L. J. M. C. 82. In *Cargill v. Cargill*, 1 Sw. & Tr. 235, 27 L. J. P. & M. 69, it is said by the Judge Ordinary, that a magistrate would not be justified in making an order, under 20 & 21 Vict. c. 85, s. 21, to protect a wife’s property after she has been deserted by her husband, unless the desertion continues up to the time of applying for the order. So here a woman cannot require relief, or be chargeable to the parish, if the husband is ready to afford her a home.

M. Bere, Q. C., for the respondent, was not heard.

COCKBURN, Ch. J. — I am of opinion that the order should be affirmed. The present statute differs most essentially from that under which *Flannagan v. Bishopscarmouth* was decided. Under the 5 Geo. IV. c. 83, a man was punishable who wilfully neglected or refused to provide for his wife. In the present statute, by sect. 33, it is enacted: — The CHIEF JUSTICE read the section.] This enactment is altogether different in scope and effect from the other, and the decision on the one Act can have no bearing on the other. The only difficulty arises from the peculiar state of the facts. The wife, sixteen years ago, left her husband in consequence of his violence and personal ill-usage of her; and no one can doubt that she was justified in leaving his house, and she is not bound to return to it unless she is satisfied that she is not

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likely again to be subject to the same usage. She is not bound to condone her husband's misconduct unless she thinks it right and safe to do so. Under these circumstances she requires parish relief, and the parish or union seek to have an order made upon the husband to contribute towards this relief. The husband appears upon the summons, and says: "I am ready and willing to take back my wife, and I am of ability to maintain her when she returns. I therefore object to the magistrates making any order." The magistrates * do not ask us whether they [* 155] were right in deciding that the wife was justified in leaving and refusing to return to her husband. They only ask whether the offer on the husband's part ousted them of jurisdiction. I am of opinion that it did not. It was for the magistrates to determine whether or not, under the circumstances, the wife was bound to return. If a wife has left her husband under circumstances which justified her in leaving, the husband is bound to maintain her, and that not in the conjugal dwelling, and she is entitled to pledge his credit for necessaries, and it is no answer that the husband is ready to receive her back. Therefore, in the present case, the wife did "require relief," if the facts were such as to warrant her refusal to return to cohabitation. The justices were the sole judges of this; they have found, as a fact, that it was dangerous for her to return (whether I should have come to the same conclusion it is unnecessary to consider, it is enough to say that the justices have so found), and the only question for us is, whether the offer on the part of the husband gets rid of his liability to have an order made upon him, and I do not think it does. It would be most dangerous to hold otherwise; as the consequence would be that a husband, when called upon to maintain his wife, would only have to say he was ready to maintain her to get rid of the summons, and the wife must either return to him or starve. The words of the section are quite large enough to give jurisdiction to magistrates to make an order in a case like the present; and it would be injurious if it were not competent to magistrates to make an order, notwithstanding the offer of the husband to receive back his wife had been made.

MELLOR, J. — I also think the magistrates had jurisdiction, though certainly some of the facts want explanation to make their decision on the merits altogether satisfactory to my mind. The justices

seem to have thought the wife justified in refusing to return to her husband; and under those circumstances the husband is liable to support her away from his home; and this liability may be enforced in various ways. If he wilfully refuses to support her he might be convicted under the Vagrant Act: but the case cited, *Flannagan v. Bishopwearmouth* (p. 339, *ante*), shows that an offer to [*156] maintain her at his home * would prevent a conviction under that statute. That decision, however, does not govern the present case. The statute here in question is in very different language. [The learned Judge read sect. 33.] Now the wife does "require relief," and does become "chargeable," in one sense, when she is in want of money; and her being "chargeable" gives jurisdiction to the justices to summon the husband to show cause why he should not contribute to her maintenance; the cause which he shows is, that he is ready to receive and maintain her at his own house. But she refuses to return on the ground of his violence, and the justices have found this refusal well founded. Is the justices' jurisdiction to make an order gone? I think not. The words of the statute are quite wide enough to include such a case, and we are not precluded by authority from deciding that the magistrates may, in their discretion, on the facts before them, disregard the offer, and make an order on the husband notwithstanding.

LUSH, J. — I am entirely of the same opinion, that the magistrates, under the circumstances detailed in this case, might make an order on the husband under sect. 33, notwithstanding his offer to receive back and maintain his wife. The case is quite distinguishable from *Flannagan v. Bishopwearmouth* decided under the Vagrant Act: that statute was passed for a different purpose and is in very different language from the present. I understand the justices to have come to the conclusion, that the wife refused to return to her husband on the well-founded apprehension of further violence, and that it would have been injurious to her health for her to return. That being so, she had a right to throw herself upon the parish, and thereby became chargeable. This is the very state of circumstances which the section seems intended to provide for; the justices may order such sum to be paid to the parish officer as they, on consideration of all the circumstances of the case, may think proper.

Judgment for the respondent.

No. 1. — In re D'Angibau. Andrews v. Andrews, 15 Ch. D. 228. — Rule.

ENGLISH NOTES.

The offence of desertion of wife or children under sect. 4 of the Vagrant Act (Geo. IV. c. 83) is not completed until they become chargeable. *Reeves v. Yeates* (1862), 1 Hurl. & N. 435, 31 L. J. M. C. 241, 8 Jur. (N. S.) 751, 10 W. R. 779.

POWER.

No. 1. — IN RE D'ANGIBAU.

ANDREWS v. ANDREWS.

(C. A. 1880.)

RULE.

A POWER may be exercised by an infant if it clearly appears to have been the intention of the donor of the power that it might be exercised notwithstanding infancy.

In re D'Angibau.

Andrews v. Andrews.

15 Ch. D. 228-247 (s. c. 49 L. J. Ch. 182, 756; 41 L. T. 645; 43 L. T. 135; 28 W. R. 311, 930).

Infant. — General Power of Appointment. — Different Classes of Powers. — [228] Power coupled with an Interest. — Power Collateral, or in Gross. — Marriage Settlement. — Infant Married Woman. — Volunteers. — Next of Kin.

By a settlement made on the marriage of a lady then, and therein described as, "an infant of the age of nineteen years and upwards," it was agreed that, after the marriage, as soon as the case would admit, certain personal estate standing in the names of the trustees of her father's will in which the lady would take a vested interest on her marriage, subject to an annuity for her mother's life, should be assigned to trustees, in trust for investment with the consent of the husband and wife, and to pay the income to the wife for her separate use, and after her death to her husband till bankruptcy or alienation; and then to hold the capital on trusts for the issue of the marriage; and, in default of such issue, in trust for such person or persons as the wife should by deed or will appoint. The wife appointed the fund by deed to her husband, and died without issue, being still an infant. An action having been brought by the

No. 1. — In re D'Angibau. Andrews v. Andrews. 15 Ch. D. 228–232.

trustee in the husband's bankruptcy, who was also the legal personal representative of the wife, against the next of kin of the wife, claiming the property :

Held, by JAMES and BRETT, L. JJ. (*dissentiente*, COTTON, L. J.), affirming the decision of JESSEL, M. R., that the appointment by the wife, while still a minor, was valid.

Heale v. Greenbank (3 Atk. 695) commented on.

Held, also, by the whole Court, that whether the appointment was valid or not, the wife's next of kin, being volunteers, could not claim under the settlement in opposition to her legal personal representative.

The decision by the Appellate Court in this case, which relates generally to the law of agency or mandate, is set forth as No. 3 of "Agency," 2 R. C. 281. The judgment of the MASTER OF THE ROLLS (Sir G. JESSEL), which was there affirmed and which relates more especially to the law of powers, was as follows :—

JESSEL, M. R. :—

[15 Ch. D. 232] I cannot allow this demurrer, but there is a question of some interest to be decided. My view of the case is that the appointment is good : and that is the real and substantial question.

The case is one of some singularity, because I cannot find that the exact point has been decided anywhere. It seems to be clearly settled, as laid down by Lord ST. LEONARDS in his work on Powers, that the exercise by an infant of a power simply collateral, as it is called, is valid. Why, when the law was altered as to the execution of powers, they did not bring the execution by infants of powers by deed to the same point as the execution of wills, is not for me to say. As a matter of fact, the Legislature has not interfered, and therefore I have only to ascertain what the law always was and still is.

That being so, the exercise by an infant of a power simply collateral being valid both as to real and personal estate, the first question I have to consider is, as regards personal estate, what becomes of a power in gross, as it is sometimes called, not being a power simply collateral and not being a power appendant ?

I had better state what I mean, because the words are used in so many different senses by different writers. The first power, a power simply collateral, I understand to be a power given to a person who has no interest whatever in the property over which the power is given. The second power, a power in gross, is a power given to a person who has an interest in the property over

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which the power extends, but such an interest as cannot be affected by the exercise of the power. The most familiar instance is that of a tenant for life with a power of appointment after his death. Then the third kind of power is a power exercisable by a person who has an interest in the property, which interest is *capable of being affected, diminished, or disposed of to [* 233] some extent by the exercise of the power. That power is commonly called a power appendant or appurtenant.

As regards the first power, that is, a power simply collateral, it is settled — so it appears from such a book of authority as Sugden on Powers — that that power can be exercised by an infant. On principle it is very difficult to see why it is so settled. I mean it is very difficult to see why, if discretion is required for the disposal of property, it should not be so in the case of the exercise of a power: and one would think there is as much judgment or discretion wanted for the exercise of a power as for the disposal of property. However, as the law stands, that appears not to be so: and the reason, if reason is to be found anywhere, seems to be this — that it requires more discretion to dispose of our own property than to dispose of other people's. That is the only reason I can find. We find expressions such as Vice-Chancellor Wood used in *King v. Bellard*, 1 H. & M. 343, 348, 32 L. J. Ch. 627, of the infant being in exercising the power “a mere conduit pipe,” but, on principle, it is very difficult to understand that the same amount of discretion or judgment should not be required in both cases, and that an infant can actually distribute property of other people, though the same infant cannot dispose absolutely of a shilling of his own property.

But, however that may be, the law is settled. Lord ST. LEONARDS says this: (Sugden on Powers, 8th ed. pp. 177, 178), “After an examination in a former edition of this work of the authorities which will now be found in the Appendix (b), it was submitted that an infant could not exercise a power over *real estate*, unless it was a power *simply* collateral;” — that is the first kind of power, — “but as to personalty, clearly he might exercise a power over that at the age at which by law he might dispose of personalty to which he was absolutely entitled.”

Now these words are quoted from *Hearle v. Greenbank*, 3 Atk. 695, and the same words are found in Bacon's Abridgment, vol. iv. p. 306, tit. “Infancy and Age.” Oddly enough, it is not said

what the age is. There was really no age, as far as I am aware, at which it was settled law that an infant might [* 234] *dispose of any personalty to which he was absolutely entitled. Some kinds of personalty he might dispose of by actual delivery; but all gifts made by him were either voidable or absolutely void. Therefore you are left pretty well where you were, except to this extent, that it is clearly settled that an infant may exercise some powers under age, otherwise the passage I have read would have no meaning at all. Therefore Lord ST. LEONARDS lays it down that as to personalty, an infant may exercise a power.

When we come to the Appendix to the work we find that, after citing a case of *Grange v. Tiving*, before Chief Justice BRIDGEMAN, Lord ST. LEONARDS in commenting upon it, says (p. 913):—“Bridgeman’s distinction that a power of revocation and new appointment may be executed by an infant to the extent of the revocation, though not further, would probably not be followed at this day. His reasoning is not satisfactory either with reference to the capacity of the infant, the donee, or the intention of the donor. His opinion was, that an infant may execute a power appendant, but he does not discuss the real question, viz., whether such a power is not in the nature of property, and therefore incapable of being exercised by an infant.”

Now I suppose Lord ST. LEONARDS, when he says, “a power in the nature of property,” means “a power in the nature of the infant’s property,” the real question being whether the infant could dispose of the property the subject of the power.

That, then, is the position of matters as far as regards personal estate. As regards real estate, I have commented upon it, and stated what the authorities are in the case of *In re Cardross’s Settlement*, 7 Ch. D. 728, and I am not going over that ground again; but there seems to be a question here whether there is a manifest intention shown by the settlement that the power shall be exercisable by an infant. Upon that it seems to me, as I said in that case, that wherever that intention is shown the power can be exercised by the infant.

In this case I have to consider, first, whether independently of any express intention shown, the power can be exercised by an infant; and it appears to me it can. If it is clearly settled that the first class of powers — powers simply collateral — can [* 235] be so *exercised, there can be no reason why the second

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class of powers should not be so exercised when its exercise cannot affect the infant's interest: I can see no sufficient distinction between the two cases. There is a very pertinent distinction between those two classes of power and the third, which seems to be alluded to by Lord ST. LEONARDS, where the exercise of the power affects the infant's property. It may be well said there that the infant cannot do any act affecting his property through the medium of a power any more than he can do so directly: but where the exercise of the power only affects other people's property, it does appear to me that if the rule is settled with regard to the first class of power, that rule should also apply to the second class of power. It can make no difference in the world that the infant has some interest under the settlement, so long as that interest cannot be affected by the exercise of the power.

Therefore, considering the rule clearly settled as to the first class of powers, I should hold it to extend to the second class of powers, independently of the authority, which says that there is a difference between realty and personalty. On that ground — and I should like to put it on that simple ground — I consider that the power was in this case well exercised.

But if I were driven to consider the second point, I think there is sufficient intention shown by this settlement that the power may be exercised during infancy; and for that purpose we must look at the settlement. The settlement begins by stating that the lady is an infant of the age of nineteen years and upwards; then, the share proposed to be settled being a vested interest in the lady at twenty-one or marriage, it states that the arrangement is that that share shall be settled; and then it is agreed that after the marriage the share shall, as soon as the case will admit, be assigned to the trustees upon trust (subject to the payment of an annuity of £300 to the lady's mother) for investment with the consent of the lady and her husband. This power of consenting to investments seems to me to be intended to be exercisable during minority. Then it says, "In trust to pay the income thereof unto the said Mary Frances D'Angibau during her life for her sole and separate use." There is a clear intention to make an immediate provision for the wife for her separate use even during infancy. * Nobody will argue that she is to wait till [* 236] she is twenty-one to get the money: it is a provision during infancy. Then after her decease the trustees are to pay the

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income to her husband, if he shall survive her until bankruptcy or alienation: and then the capital is to be held on trusts for the benefit of the children and remoter issue of the marriage: but on failure of such issue, "In trust for such person or persons and for such purposes as the said Mary Frances D'Angibau shall by deed, with or without power of revocation and new appointment, or by will or codicil, appoint; or in default of such appointment and so far as no such appointment shall extend upon the trusts following;" then the first trust is for the wife, and that trust takes effect immediately if she survives her husband, whether she is an infant or not. Then, if she dies in the lifetime of her husband the trust is for her next of kin, excluding her husband.

Now, all these trusts are clearly to take effect during her minority: and it seems to me to be quite plain that the precedent power must also have that effect.

It was suggested that because the power was by deed or will, and because by will it could not be effectually exercised till the lady was of age, therefore it could not be exercised by deed: but the answer is that an infant can exercise a power by deed but cannot by will.

It, therefore, seems to me that this settlement certainly intended that the power should be exercisable during minority, because the whole scheme of the settlement is that it takes effect immediately, although the wife is expressed to be a minor on the face of the instrument.

That being so, I am of opinion that the plaintiff is entitled and the demurrer must be overruled.

ENGLISH NOTES.

In *Shipway v. Ball* (1881), 16 Ch. D. 376, 50 L. J. Ch. 263, 44 L. T. 49, 29 W. R. 302. MALINS, V.-C., says he should follow the above decision in the case of an appointment, though he does not regard it as an authority for allowing an infant wife to waive her equity to a settlement.

AMERICAN NOTES.

According to the American text-books, an infant may execute only a power which is simply collateral. 2 Washburn on Real Property, *316-317; 4 Kent's Commentaries, *324; 18 Am. & Eng. Encycl. of Law, 950.

An infant is capable of executing a naked power unaccompanied with

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any interest, or not requiring any discretion." 1 Perry on Trusts, 5th ed. sect. 52. But see Tiedeman on Real Property, sect. 565.

In *Thompson v. Lyon*, 20 Missouri, 155, 159, land was conveyed to one Foster, in trust for his daughter, who was a minor, with a proviso that it should be lawful for the trustee, at any time thereafter, upon the request of the daughter, to convey the property to such person or persons as she should appoint, and to such use or uses as she should think fit. The daughter, while still a minor, joined with her father in a deed of the land. After attaining her majority, she brought an action to set aside the deed and recover the land. The Court decided in her favor, saying: "The defendants seek a support to the conveyance made by Virginia Wetherell during her infancy in the words of the proviso, which empowered the trustee, at any time thereafter, upon her request, to convey the premises. The *dicta* in some of the books, which maintain that an infant may make an appointment to uses of trust estates, where such authority is conferred by express terms in the deed creating the trust, do not seem to be supported by any decided case. . . . Sir Edward Sugden has remarked, in reference to the opinion that an infant might exercise a power not simply collateral, given by express words during infancy, that it would be a bold decision that an infant may have a power of disposition over an estate through the medium of the Statute of Uses. Before the statute, it is clear that an infant could not alien a use limited to him, that is, could not direct his trustees to convey the estate to a third person. In that respect, equity followed the law. Now the statute only operates on what were uses at the time it passed. A power not simply collateral is a beneficial right to direct the trustee to convey the estate to whom you shall appoint. This direction an infant cannot give by reason of his nonage. . . . A beneficial power being in the nature of property, which an infant cannot by law alienate, it would be strange that an incapacity which the law imposed should be evaded by means of a power conferred by an individual. A right to bestow on infants property, with an absolute power of disposal, would enable third persons to destroy that control with which the law has wisely intrusted parents over their minor children. Minors would become adults, as there would be no danger of loss in contracting with them."

At least one American writer, however, has been of the opinion that an infant may validly execute a power where the execution of it during infancy is expressly authorized. 1 Perry on Trusts, 5th ed. sect. 52.

In a few states the subject of powers of appointment has been dealt with by the Legislature. The New York statutes, which have largely served as a model for those of the other states where such legislation has been enacted, provide that "a power may be vested in any person, capable in law of holding, but cannot be exercised by any person not capable, of aliening lands," except in the case of married women, and "no power vested in a married woman, during her infancy, can be exercised by her until she attains her full age." New York Revised Statutes, Pt. II. ch. 1, t. 2, ss. 109-111.

No. 2. — **Bristow v. Warde**, 2 Vesey, Jr. 336. — Rule.

No. 2. — **BRISTOW v. WARDE.**

(1794.)

No. 3. — **MINTON v. KIRWOOD.**

(1868.)

RULE.

WHERE a power is authorised by an executory instrument, the Court will give effect to the intention — having regard, in case of marriage articles, to the proper objects of such an instrument; but where a power is contained in an executed deed, it must have effect strictly according to its express terms.

Bristow v. Warde.

2 Vesey, Jr. 336-351 (2 R. R. 235).

Power. — Marriage Articles. — Executory Instrument. — Intention.

[336] By articles the wife's fortune and an equal sum advanced by the husband were agreed to be settled for the husband for their joint lives, and if he should die first, leaving issue by her, for her for life, after her decease as to the capital in such manner as he should appoint, in default of appointment to be divided equally among the issue at twenty-one with maintenance and survivorship; after marriage, in pursuance of the articles, an estate purchased with the fund was settled upon the husband for the joint lives of him and his wife, remainder to trustees to preserve, &c., remainder, in case of his death first without issue, to certain uses, remainder, in case of his death first leaving any child or children, to the wife for life, remainder to all the child or children in such shares as the husband should appoint: for want of appointment, equally in tail with cross-remainders, remainder to the heirs of the husband. Children only are the objects: and an appointment to a child for life, remainder to his children as he shall appoint, is an excess of power: and the doctrine of *ex prius* by giving the child an estate tail is not applicable; but the appointment is void for the excess only: and what is ill appointed goes as in default of appointment.

Testator under a power to appoint among children appointed to the husband of a daughter for life, and if she survived him, to her for life, and having advanced her in marriage, recited that as a reason for giving her a small share: this is not illusory.

Parties taking under a will executing a power of appointment dispute part of it; there being no fund but that to be appointed, it is not a case of election.

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Personal estate under marriage articles to be invested in land, or government, or other securities; the Court finding it in its original state considers it as personal: but part having been laid out in land, which was settled, and afterwards sold, and the produce invested in stock, till a proper purchase of land could be found to be settled to the same uses, that was considered as land.

By articles executed in 1733 reciting the intended marriage of John Bristow and Ann Judith Foissin, and that her fortune consisted of £500 her own property, and £2500 given by her mother Louisa Girardot in consideration of the marriage (reserving to herself the interest of £1300 during her life) it was agreed, that those sums, together with £3000 to be advanced by John Bristow, should be invested in the *purchase of South Sea annuities [* 337] upon trust to pay Louisa Girardot Foissin the yearly produce of £1300 for her life; and to pay the surplus of the dividends to John Bristow for the joint lives of him and his intended wife; and in case he should die before his wife, leaving issue by her at the time of his decease, or leaving her *enient* of one or more child or children, that should be born alive, to pay the dividends to the wife for her life, subject to the trust as to the £1300; and after her decease to apply the capital in such manner, as John Bristow should appoint by any deed or writing attested by two or more credible witnesses, or by his will; and for want of such appointment that the said capital should after the decease of Ann Judith be divided among the issue of the marriage, share and share alike, at their respective ages of twenty-one; the interest to be applied towards their maintenance and education; with benefit of survivorship in case of the death of any before twenty-one; with a power to the trustees and the survivor, &c., with consent of the husband and wife or the survivor to sell and assign the funds or securities, wherein the £6000 should have been invested, and to invest the produce in the purchase of government or other securities, or of lands of inheritance in fee simple, subject to the same trusts. It was farther agreed, that if during the intended marriage any sum or sums should fall to the wife by inheritance or otherwise, the same should be invested with consent in writing of the husband and wife or the survivor in the purchase of government or other securities, or of lands of inheritance in fee simple, in the names of the same trustees, &c., in trust for John Bristow during the joint lives of him and his wife; and in case of his

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death in her life, leaving issue of the marriage, or leaving her *co-heiress*, for her for life; and after her decease to apply the capital in such manner, as John Bristow should by deed or will appoint, and for want of such appointment, among the issue of the marriage, share and share alike, at their ages of twenty-one, with an allowance of the produce for maintenance and education; and with survivorship in case of the death of any before twenty-one.

Between the execution of these articles and the marriage it was agreed by a memorandum indorsed, that two other sums [*§ 338*] of £1000 each to be advanced by John Girardot de Til-leaux, uncle of Ann Judith, then invested in New South Sea annuities in the names of trustees, should be subject to the trusts contained in the articles.

The marriage took place; and the several funds were laid out according to the articles. In 1739, with consent of the husband and wife, a suit was instituted in the Court of Chancery for the purpose of having the funds sold, and the produce invested in the purchase of a freehold estate in the county of Norfolk; and to have a new trustee appointed in the room of one deceased; and under the decree in that suit by lease and release of the 17th and 18th of March, 1739, the manor of Quidenham, in the county of Norfolk, was conveyed to the surviving trustees in the articles and a new trustee for ninety-nine years to secure an annuity of £52 *per annum* to Louisa Girardot Foissin for life, which she agreed to accept in lieu of what she was entitled to under the articles; remainder to John Bristow and his assigns during the joint lives of him and his wife; remainder to the same trustees to preserve contingent remainders, to certain uses therein expressed, in case the husband should die in the life of the wife without issue, or being such, all of them should die under twenty-one and unmarried; remainder, in case he should die in her lifetime leaving any child or children of her body by him begotten, living at his decease, or afterwards born alive, to the use of the wife and her assigns for life; remainder to the use of all the child or children of John Bristow and Ann his wife in such shares (there being more than one) as John Bristow by any deed or writing under his hand, attested by two or more credible witnesses, or by his last will and testament in writing witnessed as aforesaid, should direct and appoint, and for want of such appointment, to the use of the said child or children of John Bristow and Ann his wife, begotten and to be

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begotten, and the heirs of the body of such child or children lawfully issuing, if more than one, share and share alike; and in default of issue of any of the said children that the share of such child or children having no issue should be divided among the survivors of them, share and share alike; remainder in default of such issue to the use to the right heirs of John Bristow forever. By these indentures it was declared, that nothing therein should prejudice the agreement in the articles for laying out such sum or sums, as should fall to the wife during her coverture, in the manner therein mentioned.

John Bristow continued in possession of the settled [*339*] estates till 1765, when they were by Act of Parliament vested in other trustees in trust to sell; and that the produce should be paid into the bank in the name of the Accountant General, and laid out in redeemable 4 per cent annuities, till a proper purchase of lands in fee simple should be found, to be settled upon the same uses and trusts as those of the settlement of 1739: and that the dividends in the mean time should be paid to such persons, as would have been entitled to the rents and profits of the lands under the Act. The settled estates were sold accordingly; and the produce laid out in the sum of £20,737 4s. 7d. 4 per cent bank annuities; and the interest and dividends were paid to John Bristow during his life.

On the 14th of November, 1768, John Bristow died, leaving his wife Ann and eleven children, issue of that marriage, surviving. By his will dated the 24th of October, 1768, duly executed to pass real estate, he recited the articles, the settlement, the Act of Parliament, and the purchase of stock under it; and that his wife under the will of Andrew Girardot became entitled to the sum of £1027 12s. 3d., which had not been laid out pursuant to the articles, but remained due to him; and that his wife was also entitled under the will of Margaret Girardot de Prefond to a sum not received, or laid out pursuant to the articles; and that he was possessed of or entitled to several annuities in France; one of 2200 livres Tournais of the government of France, payable during the life of his wife; another of 2300 livres Tournais of the French East India Company, payable during the joint lives of his wife and his daughter Mary Bristow, and the survivor; and he gave both those annuities to his wife for life; and after her decease he gave the annuity of 2300 livres Tournais to his daughter Mary; and in

pursuance of the power given by the marriage articles he appointed after the decease of his wife to Henry Bristow, his eldest son, the money, which then was, or should at any time thereafter be, received of the said legacies of Andrew Girardot and Margaret Girardot de Prefond, upon trust after the decease of Ann Judith Bristow to pay the profits thereof to his said son Henry for his life; and after his decease the testator appointed the amount of the said legacies, which were to be invested pursuant to the articles, to and among any child or children issue of the marriage of his son Henry with his then wife in such * shares [* 340] and manner, as the said Henry should by any deed or writing under his hand, witnessed by two or more credible witnesses, or by his last will and testament witnessed as aforesaid, direct and appoint; and by virtue of the power vested in him by the said articles he thereby appointed, after the decease of his wife, the sum of £20,737 4s. 7d. per cent bank annuities to and among his children in the shares and manner following: to his daughter Ann Margaret Hobart, £1000 upon trust to pay the profits and dividends to Henry Hobart her husband during his life, and after his decease to pay the same to Ann Margaret Hobart for her life, in case she should survive her husband; and after the decease of both to pay and transfer the said £1000 to and among their issue in such shares, if more than one, and in such manner, as he or she shall appoint. Then reciting, that on the marriage of his daughter Catharine with General Fraser in 1765 he had appointed to her after the death of his wife the sum of £2500 to the uses of that marriage, he confirmed that appointment; and farther appointed to her £1000 to pay the profits and dividends thereof to her for her own use for life; and after her decease he directed the said £1000 to be transferred to and among any child or children, she might or should have, in such share or shares, and in such manner, as she should direct or appoint; and in case she should die, not leaving any children, then he gave and appointed the said stock to his son Henry upon trust for the purposes expressed in the appointment to him of the legacies. He gave to his daughter Louisa Bristow £1800 absolutely; and to his daughter Frances Neave £500, in trust to pay the profits and dividends to her husband Richard Neave for his life; after his decease to her for life, in case she should survive him; and after the decease of both to transfer the said stock to and among any children issue of their

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marriage in such share or shares, and in such manner, as he or she should appoint. The testator mentioned, that the shares of Mrs. Hobart and Mrs. Neave were so small on account of what he had before given them upon marriage. He gave his daughter Mary Bristow £500, in case she should after the decease of his wife be entitled to, or become possessed of, the said annuity of 2300 livres Tournais of the French East India Company before given to her: but if not, then he gave her £800 for her share of the said stock. He gave his three daughters, Elizabeth, Caroline, and Sophia, £1000 each; to his son John Bristow £2000, and to his son William Bristow £1800; *and he gave and [*341] appointed to his son Henry all the residue and remainder of the said stock in trust for the same uses and purposes as those expressed in the before-mentioned appointment to him of the legacies under the wills of Andrew Girardot and Margaret Girardot de Prefond. He directed, that there should be benefit of survivorship between his five daughters, Elizabeth, Caroline, Louisa, Mary, and Sophia, in case of the death of any of them unmarried, and before their shares should be payable; and he appointed Ann Judith Bristow, Henry Hobart, and Henry Bristow, executors.

The legacy under the will of Andrew Girardot was not laid out under the articles; but remained due from the estate of John Bristow the testator at the death of his widow. The legacy under the will of Margaret Girardot de Prefond was not laid out under the articles; but at the death of Ann Judith Bristow, who received the interest for her life, was vested in £1078 1s. 6d. bank stock in the names of trustees. Henry Bristow, Ann Margaret Hobart, and Sophia Bristow, died in the life of their mother; Henry left two children, George and Catharine Annabella Bristow, but he made no appointment under the power given him by his father's will, and died intestate. Mrs. Hobart left her husband and four children surviving her. Sophia Bristow left a will executed so as to pass personal estate only; and made her sister Mary sole executrix. George Bristow, the son of her brother Henry, was her heir. In 1788 Ann Judith Bristow died, leaving eight children surviving. Mary Bristow never received any part of the annuity of 2300 livres Tournais.

The bill was brought by John Bristow and other children of the testator to have the several claims upon these funds and their produce ascertained, and the necessary accounts taken: and that

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such parts of the £20,737 4s. 7d. then reduced to 3 per cent annuities, and £1078 1s. 6d. bank stock, and £1027 2s. 3d., or the money which should be received on account thereof, as were absolutely disposed of by the will of John Bristow, and the residue of the two last funds, should be transferred and paid to the persons entitled; and that the residue of the first should be laid out in the purchase of lands in fee simple, upon the trusts, and pursuant to the directions of the Act of Parliament; and that the rents and profits, and the interest and dividends of the residue of that sum, in the mean time, should be paid to the persons [* 342] *entitled; or that such residue should be distributed, as the Court should direct.

The questions were, First, Whether the appointments to Mrs. Hobart and Mrs. Neave were illusory; and therefore the whole was void; Secondly, Whether the appointments to the grandchildren, and to the husbands of the daughters were an excess of power; and if so, whether the former could be executed *cy près* by giving estates tail to the children; Thirdly, If those appointments were bad, or any of them, whether the whole should be void, or the excess only; and in the latter case how so much as was ill-appointed should be disposed of; Fourthly, Whether those taking under the execution were precluded by a case of election from disputing any part of it; Fifthly, Whether the funds were to be considered as land or money.

Attorney-General, Solicitor-General, and Mr. Stanley, for the plaintiffs.

This must now be considered as land: but all the parties are competent to say, whether it shall be laid out in land, or not.

A power as to real estate operates as a declaration of uses of a preceding conveyance or devise; and must have reference to that, and be confined within the same limits. A disposition to A. for life, remainder to such uses as he shall appoint, will enable him to make any disposition: because he has the complete disposition, and there is no perpetuity; but if that power is limited in its objects, then as it becomes a settlement, and tends to a perpetuity, it must be confined. There may be a conveyance to A. for life: remainder to any description of persons living at the death of A., and it may be suspended till full age; because an infant cannot alien: but it cannot go beyond that; nor can a power of appointment be given beyond what the person giving it could de

himself. Wherever the subjects, upon which the power is to operate, are limited, the power must be limited precisely as if the limitation had been inserted in the conveyance itself. The appointments in favour of the grandchildren cannot be good; because he could not give a power, that would have the effect of giving a life estate to a person unborn at the creation of the power; remainder to the children of that unborn person in tail.

The power operates upon the limitation in default * of [* 343] appointment as a power of revocation; and must have the same effect as an express power to revoke; which was the case of *Spencer v. The Duke of Marlborough*, 5 Bro. P. C. 592. The utmost limits, within which grandchildren could take under such an instrument, are these: if there is a limitation to A. for life, remainder to any such as should be living at his death, perhaps that might be sustained. In *Hockley v. Mawbey*, 1 Ves. Jr. 143, Lord THURLOW seems to think, it might be good; but that is only because they were expressly to be alive at his death. There is nothing in this will to confine the appointments in favour of the grandchildren to the testator's death, or any particular time. It is a general limitation to the children of his children. The execution of the power was to create an estate tail in the grandchildren taking at the deaths of their respective parents. A limitation to the children of a person unborn is bad. *Chapman v. Brown*, 3 Burr. 1626.

Under this settlement the children only were intended to be purchasers; therefore on that ground these appointments, so far as they are in favour of persons not children of the testator, cannot have effect. The power in the articles, though general, must mean among the issue of the marriage: otherwise he might defeat the purpose by giving to others what was intended as a provision for the issue; and the fund would be assets, and subject to debts. If there is only one child, it is express; the power would not arise; and such child must have taken an estate tail at least. In *Alexander v. Alexander*, 2 Ves. Sen. 640 (p. 415, *post*), the power being to appoint among children, it was held, that no others could possibly be made purchasers; and upon that case, *Maddison v. Andrew*, 1 Ves. 57, *Robinson v. Harcastle*, 2 T. R. 241, *Adams v. Adams*, Cowp. 651, and many others, it would not be possible to sustain this appointment, and make the grandchildren take as purchasers, even if all were in being at the creation of the power.

The only thing appearing in favour of that construction is what was said in the *Duke of Devonshire v. Cavendish*, stated in *Robinson v. Hardestyle*, 2 T. R. 245 (1 R. R. 470), that such might possibly be the construction: but the decision was upon the ground, that, as the appointment to Lord George Cavendish was good for his life, the Duke of Devonshire and Duchess of Portland could not during his life disturb it. Another reason [* 344] was, that they had provisions under the * will. If what this testator has done can be maintained, his son Henry might have done the same. It is simply a power to distribute; and *delegatus non potest delegare*.

But this appointment, though defective, must not be considered bad in the whole. After *Maddison v. Andrew*, *Alexander v. Alexander*, and *Pitt v. Jackson*, 2 Bro. C. C. 51, it must be considered void for the excess only; viz., as to the grandchildren and the husbands of the daughters; then all not disposed of under the authority of these instruments is unaffected by the will; and will go among all the children as tenants in common.

LORD CHANCELLOR: —

Why may not I construe it an estate tail, in Henry as to the land?

For the plaintiffs: —

It was intended, that the children should take absolutely by purchase; not that it should go, as an estate tail would carry it. In *Humberston v. Humberston*, 1 P. Wms. 332, the same sort of devolution was intended, as takes place in an estate in tail male.

LORD CHANCELLOR: —

I do not know, that it was ever pressed, that if part was bad, the whole should be void.

For the plaintiffs: —

Never; except in *Pitt v. Jackson* upon the ground that the whole view of the testator was totally defeated by the effect of his appointment.

Mr. Hardinge and Mr. Campbell, for the son of Mrs. Hobart, and Mr. Piggott, for Mr. and Mrs. Neave, contended that the appointments to Mrs. Hobart and Mrs. Neave were illusory; and therefore the whole was void; also that if the appointment was

bad in part, the whole was void; for it could not be presumed, that if the testator had known, that certain parts could not be executed, he would have said, the subject of such parts should go to others, or that he would in that case have had the rest executed.

Mr. Mansfield, Mr. Lloyd, Mr. Richards, and Mr. Hol- [345] list, for the widow and children of Henry Bristow; and Mr. Romilly, for Mr. Hobart:—

This is a general power under the articles. In all marriage articles the object is to provide for the wife and issue; but it is impossible to say this is a power to appoint to children, when by the same articles in case of no disposition it is to go to the children. In the *Duke of Marlborough v. Lord Godolphin*, 2 Ves. Sen. 16 (p. 397, *post*), stress was laid upon this; that from the effect of the word “such” the children could take nothing but under the appointment of Lady Sunderland; but it is wrong to make these cases depend upon a nice distinction between words. The maxim, that *delegatus non potest delegare*, does not apply. He could not delegate a power to give according to a discretion in him; but he was absolute owner, and could dispose of it to whom, and how, he pleased. The legacy fund being by the articles to be laid out either in stock or land, and the decree and Act of Parliament not touching that, the Court will, according to a late case, *Walker v. Denne*, 2 Ves. Jr. 170, take it as they find it. If the appointment cannot take place for the grandchildren as such, the Court will execute the intention as near as possible by giving Henry an estate tail according to *Pitt v. Jackson*. In *Langston v. Blackmore*, Amb. 289, under a power of appointment to children, an execution extending to grandchildren was held good. The plaintiffs cannot say, it was well executed in part and ill executed in part; for claiming interests under the will they cannot dispute any disposition by it.

Attorney-General, in reply:—

The same principle, upon which, where there is an appointment with a condition, and the condition is bad, the appointment is good, repels the doctrine of election. If an express condition would be bad, an implied condition, the foundation of election, must be bad. This limitation must be intended to comprehend all the grandchildren; but real and personal estate must be limited to persons who must necessarily take within lives in being and twenty-one years. A provision on marriage is a contract with,

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or conveyance to, the issue: equitable, if upon articles: legal, if ripened into a settlement. These funds were vested in [346] the children with *a power reserved to disappoint that vested interest by a limitation arising out of the execution of the power. That cannot be disappointed but by an execution *modo et formâ*, as provided. It is a contract with the children, that they shall take equally, unless he makes another distribution among them. If you go beyond the children, there is nothing to prevent it from being given to any branch of the family, by giving to whom there may arise some advantage to the children. In *Falkner v. Butler*, Amb. 514, great-nephews were excluded; nephews being the object. In *Adams v. Adams* the Court never thought, that because it was void for the excess, it was not good at all: nor did the doctrine of *ex præ*, or the notion of an estate tail, occur to them. Under a general power so much as is given consistently with the rules of law, will stand: why should there be a different construction of a more limited power? *Chapman v. Brown* cannot apply to the execution of a power. There the Court wisely considered the general intention to transmit through the descendants, and to support that took the words, as they stood, by a slip perhaps; and would not supply the omission to defeat the intention. In *Robinson v. Hardeastle* Mr. Justice BULLER, looking to *Pitt v. Jackson*, says, that in the former case the son was tenant in tail either under the settlement, or under the will by implication, from the general intention. It was immaterial to the defendant under which; but the latter branch of the proposition was much doubted; it stands upon no authority but *Pitt v. Jackson*, which, if it went upon an implied estate tail under the will, is inconsistent with *Adams v. Adams*. Suppose Pinckney Wilkinson had had an estate in fee, and a power of appointment over another; and in the same clause had given the former, and appointed the latter, to Mary Smith for life; remainder to her first and other sons in tail; remainder to her daughters; remainder to his own right heirs: would it not have been a strict settlement, and could she have an estate for life in one estate, and in tail in the other? The principle of all the cases for an implied estate tail is, that there was a clear *indivium* of an intention, that all the issue should take in the course in which an estate tail would go; but no inference can be drawn from those cases to this, where there is no such indication.

This appointment would have been good, even if no interest had been given to Mrs. Hobart and Mrs. Neave. I admit the general doctrine; but the Court will say, what is illusory in one *case is not so in another; because reasonable: [*347] *Burrell v. Burrell*, Amb. 660. He expresses his reason for not giving them more, and that shows his intention was not to elude; but that he had a rational motive consistent with his duty as a parent.

LORD CHANCELLOR (LORD LOUGHBOROUGH): —

The only difficulty in this cause is that which surrounds the Court in all cases, where a parent has with tenderness, wisdom, and discretion, made a distribution of his fortune according to the circumstances of his family at the time; but has done more in the mode of doing that, than the strict construction of a power allowed him. The Court necessarily feels great inclination to support what appears upon the whole very desirable. I have given all the attention I could to this case, to see, if by any favourable construction I can consistently with the course of the cases and the rules find means of substantiating to any extent the disposition made. The first consideration is, what is the construction of the articles. I was at first struck with the idea, that was urged, that the extent of the articles gave him a larger power, than the settlement afterwards made purporting to be in pursuance of the articles had left him. But it is clear upon the articles, he had no more power under them, than what he took to himself under the settlement executed with regard to the bulk of the money. The articles were made in order to secure a provision for the intended wife and the issue of the marriage. That is the object of all marriage articles; particularly here, where equal sums were brought in by both parties to be settled for the family: but it was contended, that the power here is indefinite as to its objects. It would be a forced construction of articles to hold, that a provision to be made for children, in default of appointment to be equally distributable, in the case of an appointment should be subject to his debts; which would be the necessary consequence of holding, that he had an indefinite power of appointing, only providing for the jointure of the wife; for if he had that indefinite power it would be assets; he might appoint to any one; his creditors could affect it; and if he executed his power for the children, the children must

take it subject to the debts of their father. It is not the natural frame of such a settlement, nor is it the construction of the words of this. It is clear, the power of appointment is not indefinite; but is confined to the issue.

[348] Then it is contended, that the word "issue" has a larger extent than the word "children" in the settlement. It may be so in many cases. Grandchildren are issue; and the Court would often let them in; but it is impossible here, for the issue here is strictly defined. They are to take at twenty-one; and an application of the produce is directed for maintenance and education before that age; and the survivor attaining that age was entitled to the whole fund; and those dying before it were not to have any. Therefore children were necessarily intended. Besides in the execution of their intention the parties expressed the sense, in which they understood it, by framing the settlement to the children subject to a power of appointing among the children. Therefore I am unable to extend the construction of either the settlement or the articles beyond the children; and whatever inclination the Court has shown in other cases, it is not now to be argued, that such a limitation with a power to appoint to children can extend to grandchildren. The cases quoted, which were fully discussed, have fixed that; and as to all that part to be laid out in land (which is material here) there is a technical rule, that makes it impossible in the limitations of real estate under a power to carry them beyond the first degree; because it would carry it beyond the legal limits of lives in being and twenty-one years after. If therefore children are the limits within which this must be confined, so much of the will, as goes beyond these objects, to whom he was enabled to give any share, cannot take effect.

As to the consequence of his executing the power, by which as to certain parts he has embraced objects not within the power, if I could find means of effectuating the general purport, though not in the mode, he has adopted, of extending in another way the benefit of the appointment to the grandchildren, it would be desirable in this case. The case is unfortunate as to the eldest son. It is probable, that out of regard to the eldest son and his issue he made this disposition; but that intention must totally fail, unless by construction I can raise an estate tail in the son. The idea struck me at first, but it is impracticable. This differs materially

from *Pitt v. Jackson*. Without entering into a discussion of that case and the objections made by the Attorney-General to Lord KENYON's decree, and supposing it to stand as a clear authority, it would not enable me to do the same thing * here; [* 349] for there the limitation of the will was to Mary Smith for life: remainder in tail to her children as purchasers; she being entitled under that settlement to a vested estate tail subject to be divested by the appointment. Therefore there was not that difficulty, which is in the present case, in construing, that he reduced her interest, that her children might take estates tail by purchase; and that that might be executed *cy près* by letting the estate tail, she had, exist, so as to carry over the benefit to her children. Here it is a power to Henry to appoint to children in such shares as he thinks fit. No estate tail is given; nor is any intention of that sort expressed; but the children would take either by the appointment, or for want of it distributively *per capita*. Therefore that does not apply; and I am under the necessity of saying, the interests to the children of Henry cannot in any respect take effect either as to the land or the money.

It was argued, that the appointments to Mrs. Hobart and Mrs. Neave giving them nothing immediately, but only contingent interests for life, are illusory; and therefore the whole is bad. It would be a very hard construction to hold, that by the part of the execution of his power, which was directed towards them, he meant to illude, and make a gift, that is in fact no gift; because in the manner, he conceived it, not doubting his power he gave an estate to the husband of each for life; remainder to them, if they should survive their husbands. If he had given to the wife for life, and in case the husband should survive, to the husband, that would have been a substantial gift to the wife; for it is admitted, a gift for life is sufficient. *Alexander v. Alexander*, 2 Ves. Sen. 640. He has done the same thing; for the husband would in that case, in point of law, have taken during the life of the wife. The insertion of the name of the husband prior to that of the wife is doing no more than if he had given to the wife first. The intention therefore not being to illude, but to give in effect such estate as a married woman could take, viz., for the benefit of the husband as long as the coverture should continue, it is not illusory. But, independent of that, the answer of the Attorney-General is full and unanswerable; that the Court will not set it aside as illu-

say, where the ground is that stated in this testator's will. He, having power to appoint, provided these children upon marriage with what he thought an adequate settlement, considering them [350] as provided for, and therefore * not within the true meaning children to be provided for out of his power. Therefore there is no defect in the appointment to vitiate the whole.

The next question is, Whether the whole being defective as to part should be totally set aside, and the fund be distributed as in default of appointment. It is contended, that if it cannot take effect in the manner, the distribution was made by the testator's father, the question will be, what he would have done, if he had been apprised, that part failing, there would arise an inequality unforeseen by him as to his children. The answer is, nobody can tell what he would have done; but that is not a ground for setting aside the whole: for each child, to whom he has well appointed, has a right to claim that: for instance, John Bristow, who has £2000. The Court has no right to take that away. There is no reason to say to them, "You shall not take this, because the intention as to the rest cannot take effect." There is no ground to rescind the gifts to them of their parts. I asked, whether there was any case, where the whole was set loose, and distributed, as if no appointment had been made, because part of the appointment was bad. That proposition therefore is untenable, that in case of a flaw in the execution as to part, the whole must be void. All that is well appointed, will stand.

The consequence is, the remainder must be divided as in default of appointment: unless it will hold, as argued, and I do not know how to state it as to this case, that a person to whom a specific share is appointed, shall be excluded from taking any of the unappointed share, because it is clear, the father meant, he should have no more, than what was particularly given. The doctrine of election cannot apply, where there is no other subject but that to be appointed. It never can be applied, but where, if an election is made contrary to the will, the interest, that would pass by the will, can be laid hold of to compensate for what is taken away; therefore in all cases there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away. That cannot apply to this case, where no part of his property is comprised in the will but that, which he had power to distribute.

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The consequence of this opinion is, that the legacy fund, which is personal, ought to be distributed equally among the * children living at the death of John Bristow; and must [* 351] be paid to them or the legal representatives of such, as are dead; and that the £20,737 4s. 7d. reduced bank annuities must be considered as land; and so much thereof, as is declared ill appointed, belongs to the children living at the death of John Bristow as tenants in common in tail with cross-remainders.

Minton v. Kirwood.

L. R. 3 Ch. 614-621 (s. c. 37 L. J. Ch. 606).

Marriage Settlement. — Power, whether confined to Issue. — Reference to [614] Uses, whether it includes a Power. — Enfranchisement to Cestui que Trust. — Direction that Vendor shall convey.

By a marriage settlement, reciting only the intended marriage, and that it had been agreed that the lady's property should be settled and assured to the uses after mentioned, freeholds were conveyed to the use of the wife for life, remainder to the husband for life, remainder to such uses and upon such trusts as the wife should appoint, and in default of appointment to uses in favour of the issue of the marriage. The wife covenanted to surrender her copyholds "to the uses hereinbefore expressed" concerning the freeholds: —

Held, that the power of appointment was general, and could not be restricted to a power to appoint to issue. *Bristow v. Warde*, p. 356, *ante*, explained:

Held, also, that the covenant to surrender the copyholds to the same uses as the freeholds made the copyholds subject in equity to the same power of appointment as the freeholds, though powers were not expressly referred to in the covenant.

An appointee under the power was admitted to the copyholds, and obtained an enfranchisement to himself: —

Held, that the concurrence of the customary heir of the settlor was a question of conveyance, and not of title, for that the heir clearly had no beneficial interest.

In a decree for specific performance, a direction that the vendor shall convey has the same effect as a direction that the vendor and all other necessary parties shall convey.

Order of STUART, V.-C., affirmed.

This was an appeal by the defendant, a purchaser, from an order on further consideration, directing specific performance.

On the 1st of June, 1848, Susan Biggs mortgaged freeholds in fee, and covenanted to surrender copyholds to the mortgagee.

By settlement, dated the 7th of June, 1848, made on the marriage of Susan Biggs with the plaintiff, reciting the intended mar-

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riage, and that upon the treaty for the marriage it was agreed that the property therein mentioned should be settled and assured to the uses thereafter declared concerning the same, Susan Biggs conveyed her freeholds (subject to the mortgage) to the use of herself and her heirs until the marriage, and after the marriage to the use of herself for life, remainder to the plaintiff for [* 615] life, *remainder "to such uses, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisos, declarations, and agreements, and charged and chargeable in such manner, and for such estate and estates, interest and interests," as Susan Biggs should, by deed or will, appoint, and in default of appointment to the use of her children as tenants in common in fee. She also covenanted with T. Worthing to surrender her copyholds, "to hold the same unto the said T. Worthing, his heirs and assigns, to such and the same uses as are hereinbefore expressed and declared concerning the freehold hereditaments, or as near thereto as the nature and tenure of the property will admit."

The marriage was solemnised, and shortly afterwards, the wife having been admitted, the copyholds were duly surrendered to the mortgagee and his heirs, subject to redemption by the husband and wife, their heirs, suis, executors, or administrators. The mortgagee never was admitted. No surrender was ever made according to the covenant in the settlement.

Susan Minton (formerly Biggs) died in 1852, having previously made a will, by which she appointed the settled property to the plaintiff and his heirs. In November, 1853, the plaintiff was admitted to the copyholds, and in November, 1864, the lord of the manor, by deed, enfranchised them to the plaintiff and his heirs, subject and without prejudice to the conditional surrender to the mortgagee. The mortgage was still subsisting.

The plaintiff having contracted to sell to the defendant the enfranchised copyholds, and he having taken objections to the title, the present suit was instituted. Vice-Chancellor STUART made a decree for specific performance, with the usual reference as to title, and when a good title was first shown, and with a declaration that the concurrence of Susan Minton's customary heir was not necessary. (L. R. 1 Eq. 449.) The LORDS JUSTICES, on appeal, varied the decree by striking out this declaration. The chief clerk certified that a good title had been shown, and the

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defendant moved to vary the certificate. The VICE-CHANCELLOR refused the application, and made an order for completion of the purchase, only directing the vendor to convey, without the addition of the words "and all other necessary parties."

* Mr. Joshua Williams, Q. C., and Mr. Bristowe, for [* 616] the appellant:—

The VICE-CHANCELLOR clearly decided the case on an erroneous ground on the former occasion, it being quite impossible to hold that the mortgage gave the equity of redemption to the husband and wife as joint tenants. *Jackson v. Innes*, 1 Bli. 104. The husband had no legal right to admittance, and acquired no legal title by it. *Zouch v. Forse*, 7 East, 186; *Matthew v. Osborne*, 13 C. B. 919; *Steele v. Waller*, 28 Beav. 466. The heir has an outstanding legal estate, and *Wilson v. Allen*, 1 Jac. & W. 611, does not show the contrary. But we say he has also a beneficial interest. The power of appointment being in a marriage settlement ought to be construed as a power to appoint to issue only. *Bristow v. Warde*, 2 Ves. 336 (p. 356, *ante*); *Cooke v. Briscoe*, 1 D. & Wal. 596; *Mackinley v. Sison*, 8 Sim. 561; *Peorer v. Hassel*, 1 J. & H. 341. At all events, the title is too doubtful to be forced on a purchaser. *Pycke v. Waddingham*, 10 Hare, 1. The legal estate remained in Mrs. Minton, the surrenderee never having been admitted. *Doe v. Tofield*, 11 East, 246; *Rex v. Mildmay*, 5 B. & Ad. 254; *Doe v. Harrison*, 6 Q. B. 631.

[The Lord Justice Wood referred to *Holdfast v. Clapham*, 1 T. R. 600.]

The copyhold subsists where the lord grants the freehold to a stranger. *Murrel v. Smith*, 4 Co. Rep. 24; *Phillips v. Ball*, 6 C. B. (N. S.) 811; *Bell and Langley's Case*, 4 Leon. 230. No power was created over the copyholds, the covenant being only to surrender them to the "uses" declared concerning the freeholds; whereas where it is intended to create the same powers the form always used is "to the uses, and with, under, and subject to the powers, provisos, and declarations," expressed and declared concerning the freeholds.

[*Bernard v. Minshul*, Johns. 276, *Doe v. Bartle*, 5 B. & A. 492, and *Hoddel v. Pugh*, 33 Beav. 489, were also referred to.]

* Mr. Bacon, Q. C., and Mr. Blackmore, for the plain- [* 617] tiff, were asked whether they wished the question, whether the heir was a necessary party to the conveyance, to be argued at

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the present stage, and replied that they did not. They were accordingly not called upon.

Sir W. PAGE WOOD, L. J. :—

It may be unfortunate, but certainly, if so, it is entirely the fault of the appellant, that the appeal should be presented in this stage. We are clearly of opinion that the concurrence of the customary heir, if necessary at all, is merely matter of conveyance, for that there is no such ground for a claim on his part to any beneficial interest as to make it reasonably arguable that his concurrence is a matter of title.

As regards the question of conveyance, nothing has been done which prejudices the defendant. Originally there was, in the decree of the VICE-CHANCELLOR, a declaration that the heir was not a necessary party to the conveyance, but, on appeal, that declaration was struck out, leaving only the common reference as to title, and an inquiry when a good title was first shown. Under this decree a certificate was made that a good title had been shown, and a motion to vary the certificate has been refused. A decree for specific performance followed as a matter of course. A decree was accordingly made that the plaintiff should convey. It does not contain the words which are sometimes inserted, "all other necessary parties, if any," but that I take to be wholly immaterial, for the direction that the plaintiff shall convey includes, in effect, the mortgagees and all other necessary conveying parties.

Now, all we have to consider at present is, whether that decree is wrong, and it appears to us that it is entirely right. The question whether the customary heir is a necessary party to the conveyance, if it is to be argued at all, must be argued at a later stage of the proceedings, and if the defendant should suffer any inconvenience from being brought here a second time, he must remember that it will be owing to his having come here prematurely. I think, however, that he really came here because he wished to have the question of title argued. He distinctly raised upon his answer a question of title, namely, that Susan [* 618] Biggs had no power to appoint the property as she did, and in that contention we are of opinion that he is entirely wrong.

The argument on behalf of the defendant is twofold, first, that as the deed was a marriage settlement, an intention to make ade-

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quate provision for children is to be inferred, and that therefore, according to the doctrine of *Bristow v. Warde*, 2 Ves. 336 (p. 356, *ante*), large as the terms may be in which the power is granted, it must be cut down to a power to appoint to children only. Secondly, it is said that independently of that question, as the covenant to surrender the copyholds to the same uses as are declared of the freeholds does not refer to the same powers, provisos, declarations, and agreements, as are contained with reference to the freeholds, no power of appointment is created as to the copyholds, for that the uses to be created under the power are not uses expressed concerning the freeholds in the deed creating the power.

Now, first, as regards *Bristow v. Warde*. Every case of course must turn upon its own facts, though there may be a general principle to be extracted from it. The decision in *Bristow v. Warde* turned peculiarly upon the actual circumstances of that case, as I had occasion to observe in *Peover v. Hassel*, 1 J. & H. 341, founding myself upon Lord ST. LEONARDS' observations, which, of course, was more satisfactory to me than simply standing on my own judgment. It was considered by that noble and learned Lord, and I concurred in holding, that *Bristow v. Warde* is not a case which can be considered as laying down the general principle — that in a marriage settlement you are to restrict the words of a general power in the manner in which they were there restricted. There they were restricted on account of the peculiar words used, which do not occur in the present case. In *Peover v. Hassel* I had to consider a much more difficult case than the present, because there the general power was to arise only in the event of there being issue, which, of course, if we were at liberty to indulge in conjecture as to the intention, would furnish a very strong ground for holding the power to be confined to issue. In the present case there is no such difficulty. The settlement simply recites that a marriage is intended to take place, and thereupon it is agreed that the property shall be settled and assured to the uses after mentioned. * It is settled to the wife for [* 619] life, then to the husband for life, then comes the power, and there is nothing in the recital to lead to the inference that it was intended to be less extensive than its words import, and I cannot accede to the argument that it is to receive a different construction as regards the copyholds, for a covenant to surrender

copyholds to the uses declared of freeholds cannot, in my opinion, be considered executory in the same sense as marriage articles and other agreements resting *in fieri*.

There being, then, a covenant that the copyholds are to be surrendered to the same uses as are expressed of the freeholds, let us look back to what the uses of the freeholds are, and it will be seen that it is a play upon words to say that the power is not included. The first limitation after the life estate of the husband and wife is to such uses and trusts as the wife shall appoint. Then the intention being that the copyholds shall go exactly in the same way as the freeholds, it is a correct and proper way of effectuating that intention to say that the copyholds shall be limited to such uses as are expressed of the freeholds, some of the uses expressed being such uses as Susan Biggs should appoint. Probably, in cases where there are numerous complicated powers taking effect by way of proviso in derogation of the uses limited, as, for instance, in the case of powers of sale and exchange, it is right, *ex majori cautela*, to refer expressly to the power, as is done in the common form referred to in argument. Here there is nothing but a continuous series of declarations of uses as to the freeholds, and to say that it is doubtful whether a covenant to surrender copyholds to the uses expressed of the freeholds includes the limitation to such uses as the wife should appoint, would, I think, be an abuse of the doctrine of the Court, which ought not to be pushed further than it has been, that the Court will not compel a purchaser to take a doubtful title.

The question, then, is reduced merely to a matter of conveyance, for we consider that the attempt to distinguish this case from *Wilson v. Allen*, 1 Jac. & W. 611, wholly fails. Sir T. PLUMER there says (1 Jac. & W. p. 620): "It is clear that the lord may, in general, convey the freehold of the land to a stranger; it is true that will not operate as an enfranchisement, because

the act of a stranger cannot affect the tenure of the [* 620] tenant, which is, therefore, not changed by the lord's parting with the freehold." But where the equitable owner has been admitted, and so is registered as the tenant of the lord, and an enfranchisement is made to him, the learned Judge says: "The trustee cannot then object and oppose the act of his *cestui que trust*; he cannot insist on keeping the copyhold alive, nor can he refuse to do whatever may be necessary to complete in

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point of form that which is already substantially done." In the present case, therefore, the customary heir, having no claim whatever to any beneficial interest in the property, cannot oppose, as against his *cestui que trust*, that which has here been done. It seems to us, therefore, that this is simply a question of conveyance and nothing else, and that, looking to all the circumstances of the case, the present appeal must be dismissed, and dismissed with costs.

Sir C. J. SELWYN, L. J. :—

It has been much pressed on us in this case that it would be a great hardship for the purchaser, on the fourth hearing of this matter, and on the second hearing before the Court of Appeal, not to have a determination of the real matter in controversy. Certainly, if that were a correct representation, I should be very unwilling to be a party to the infliction of any such hardship, but I think this subject may be looked at in two lights, — with reference to substance and form. The only matter of substance is the question whether there is any beneficial interest in the heir of the settlor, or such a doubt as to the existence of that interest as can be considered an objection to the title? That is a question of substance, and upon that we express a clear and decided opinion.

I entirely concur in the opinion which has been expressed by the LORD JUSTICE, that this is the case of an executed settlement not of an executory instrument. It is admitted to be entirely executed and completed as regards the freeholds, and so far as the copyholds are concerned, although it is true that something remains to be done by performing the covenant to surrender, yet as regards the declaration to uses the instrument is completely executed and settled, because all that has to be done is to insert in the surrender the same words that are used with reference to the settlement of the freeholds.

* The argument, then, is reduced to the two points to [* 621] which the LORD JUSTICE has adverted. As to the question whether the settlement in its terms was controlled by the recital, it appears to me impossible to hold that where there is an agreement for a settlement, and that the property is to be settled and assured to the uses thereafter declared, and you find there is first a limitation to the lady for her life, afterwards to the husband for his life, and then a general power of appointment given

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to the wife, and in default of appointment limitations to the children, and ultimately to the wife and her heirs — this is not a settlement; but that has really been the contention. I think it would, perhaps, be going too far to say, after the argument we have heard, that this is not an arguable question, but all I can say is, that the very able and learned argument which we have had the pleasure of listening to has convinced me that there is no substance whatever in the case which is sought to be put forward to establish the existence of a beneficial interest in the heir-at-law. I think that the other question which we are supposed now to leave undecided, viz.: — whether he is a necessary conveying party, is not a question that has yet arisen at all; and it would be going beyond the province of this Court if we were to speculate on the probability of some idle contention being raised on his part, and decide a question which may never arise, and can only arise by reason of his refusing to do what can do him no possible harm, viz., convey for the further satisfaction of the purchaser any interest which he may have. I think it is unnecessary to decide on the present occasion whether the heir has any legal estate or interest whatever; that may be a matter of considerable doubt, but I trust that the good sense of the parties will lead them to adopt such a course that it will not have to be raised.

I quite agree with the LORD JUSTICE, that under the present circumstances the appeal should be dismissed with costs.

ENGLISH NOTES.

The case of *Bristow v. Warde* has been here set forth at length, as it has been frequently cited upon various points, as well as being an authority for the former branch of the rule. The criticism of the judgment in the latter case, *Minton v. Kirwood*, shows that the distinction indicated by the rule can only be applied within very narrow limits.

AMERICAN NOTES.

Bristow v. Warde, with other cases, is cited in 4 Kent's Commentaries, §346, as authority for the proposition that "the intention of the donor of the power is the great principle that governs in the construction of powers: and in furtherance of the object in view, the Courts will vary the form of executing the power, and, as the case may require, either enlarge a limited to a general power, or cut down a general power to a particular purpose."

But a power general in term will not be cut down to a particular power unless an intent to do so is apparent from the instrument conferring the

No. 4. — Hervey v. Hervey, 1 Atk. 561. — Rule.

power. *Thompson v. Garwood*, 3 Wharton (Penn.), 287; 31 American Decisions, 502.

In general, powers are to be construed in the light of the purpose which the donee is appointed to accomplish, and the intent of the donor as to the mode of its accomplishment. *Capal v. McMillan*, 8 Porter (Ala.), 197; *Nevin v. Gillespie*, 56 Maryland, 320; *Jackson v. Feder*, 11 Johnson (N. Y.), 169; *Wilson v. Troup*, 2 Cowen (N. Y.), 195; 14 American Decisions, 458; 18 American & Eng. Encycl. of Law, 1st ed. 895.

No. 4. — HERVEY v. HERVEY.

(1739.)

No. 5. — CHAPMAN v. GIBSON.

(1791.)

RULE.

WHENEVER a man, having power over an estate, does a legal act showing the intention, in discharge of moral or natural obligations, to execute the power, the Court will operate upon the conscience of the person otherwise entitled, to make him perfect this intention.

Hervey v. Hervey.

1 Atk. 561-569.

Power. Defective Execution.

A Court of equity will supply a defective execution of powers, as well [561] in the case of younger children and a provision for a wife, as in favour of purchasers or creditors.

Edward Hervey, the father, by settlement made on his own marriage with his first wife, the mother of the defendant Michael Hervey the son, was tenant for life of the family estate which was very large, with a power to make a jointure on a second wife of £600 *per annum*, remainder in tail to his first and other sons.

On the marriage of the defendant the son, it was agreed that a recovery should be suffered to bar the uses of the former settlement; that in consideration of £3000 part of the portion paid to the father, the defendant should be put into immediate possession of part of the estate, and as to the rest it was to be settled on the

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father for life, with power for him to make a jointure, of such of the lands as he thought proper, not exceeding £600 *per annum* remainder to the son in tail, remainder over, and the settlement was made accordingly (by indentures bearing date the 22nd and 23rd days of July, 1715, and in the release there was the usual covenant from Edward and Michael to make further assurances).

Hervey the father, before his marriage with the plaintiff his second wife, whose maiden name was Mary Carteret, by his deed, dated the 5th of May, 1725, conveyed all the premises in the settlement contained, limited to him for life, of the yearly value of £900 to trustees (and their heirs during the lives of the said Edward and his intended wife), in trust, in the first place, to pay £100 clear, as pin-money, to the intended wife during the coverture; and upon this further trust, if she survive her husband, to pay the plaintiff £300 *per annum* rent-charge to his wife for her jointure, and to permit the defendant to take the profits of the estate, provided he did not interrupt her in the receipt of the £300 *per annum*, which was declared to be in bar of dower of the wife, or of any jointure on any other land.

The marriage took effect.

By a second deed Hervey the father gives his wife another £300 *per annum* clear, as a further provision by way of jointure. [* 562] * And by a deed of the 15th of January, 1731 (reciting the two former executions of the power and for the more effectual securing the payment of the said sums of £100, £300, and £300, at the times therein mentioned, &c.), as a further provision for the wife, and in execution of the power, Hervey the father conveyed all the said premises to the same trustees in the former deed, to raise, during the joint lives of the husband and wife, the said sum of £100 *per annum* for pin-money, and the net sum of £600 *per annum* as a provision for her in case she survive her husband, in bar of all other provisions before made; and in this settlement is the following declaratory clause.

“It is hereby declared and agreed, by and between all the parties to these presents, that it is the intention of this deed, and of the preceding ones, to secure a jointure to his then wife, not exceeding £600 *per annum*.”

No recovery was ever suffered in pursuance of the agreement made on the son's marriage.

Mrs. Mary Carteret, now Hervey, survived her husband, and

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has brought her bill against his son Michael Hervey, and the trustees under the several deeds, to have the benefit of those provisions, all or some of them.

LORD CHANCELLOR (Lord HARDWICKE). — The first thing to be considered is the construction of the power under the deed, between Edward and Michael Hervey.

It is very plain that this was a power in Edward Hervey to settle a jointure upon any after-wife, and so *toties quoties* upon any subsequent marriage; it is a power likewise to settle and assure, that is, to convey a legal estate; but then it is limited in point of value, for he could not settle all the manor, but only so much as would amount to £600 a year, and that only during the natural life of such wife.

It is very certain, nor is it denied by the plaintiff's counsel, that Mr. Edward Hervey, in point of law, could not, by virtue of this power, settle an annuity clear of taxes upon any after-marriage, by way of provision for the wife.

Let us then consider in what manner Mr. Edward Hervey has executed this power.

In the first place, he conveys all the lands which were subject to the power to trustees, not to the intended wife, for raising a clear £300 *per annum*.

By the second deed, to raise £300 more, clear of taxes, &c.

And by the third deed, he recites that he intended only to secure to her £600 *per annum* and no more, by all those deeds.

Now upon this state it appears to me, that the execution of the power is absolutely void in law and equity.

For the power is to settle lands for a jointure, or provi- [563] sion, not exceeding £600 *per annum*, and he has settled £900 *per annum*.

The words jointure, or provision, are synonymous terms; but this is a conveyance to trustees, which is in point of law no jointure; for, to make it so, the conveyance ought to be to the wife herself.

Mr. Edward Hervey too has conveyed a clear estate of £600 *per annum*, which is likewise contrary to the power.

As this is undeniably void in law, consider how it will stand in equity, and I say it is void there too; but when I say void there, I do not mean that this Court will not go as far as possible to supply a defect in the execution of such a power.

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In the present case, neither of the parties can possibly have what was originally intended them by the power; for in respect of Mr. Michael Hervey, the defendant, it is contrary to what was stipulated between him and his father; for here is a clear rent-charge issuing out of his estate, instead of being subject to taxes, &c., and in respect to the plaintiff, there is not what was stipulated for her, because the power will not extend to give a clear rent-charge.

It has been rightly observed by the bar, that a Court of equity will supply a defective execution of powers, as well in the case of younger children and a provision for a wife, as in favour of purchasers or creditors.

But the counsel for the defendant insist, that this relief is applicable only to a wife unprovided for, and that here the wife is provided for by the settlement previous to the marriage.

But as the whole which has been done in this case is directly contrary to the power, she must be looked upon as a wife unprovided for.

The case of *Smith v. Ashton*, Cha. Ca. 263, and *Tollet v. Tollet*, 2 P. Wms. 489, before the late Sir JOSEPH Jekyll, sufficiently prove, that where powers are defectively executed, this Court will supply them notwithstanding.

Upon these authorities, and many more which might be mentioned, there can be no doubt but if a tenant for life, who has such a power, does after marriage execute the power, though defectively, yet it shall be supplied.

I am of opinion, here, that the wife cannot have what was stipulated for her, previous to her marriage, carried into execution; for if I should so decree, it would be breaking in upon the agreement under the deed between Edward and Michael Hervey.

Then taking it upon this footing, she must be considered as a wife unprovided for; and if so, she is clearly entitled to the relief of this Court, according to the authorities before mentioned. This case, in some respects, differs from any other that has been cited, viz., *Bath and Mountague's Case*, Select Ca. in Chanc. 55, 2 Ch. Rep. 417, &c., because in them there was a provision, but a defective one.

Then it falls pretty much within the rules of a wife, or child unprovided for, by defective provisions, under a will; and to

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this purpose the case of *Weeks v. Cru*, decreed by Lord [564] COWPER, 1717, is applicable.

One reason that weighs greatly with me in the decree I am going to make, is this, That if the wife had claimed the £600 *per annum* without setting forth any consideration, but merely as a voluntary gift from her husband, there is no doubt but the Court would have given it her, and it would be very absurd to say, that because she sets forth in her bill a valuable consideration for a part, therefore she shall lose the whole.

If there had been any proof in this cause of her using unwarrantable means to insinuate herself into the favour of an old man, and, by imposing upon his weakness, had gained anything clandestinely, it might have had some weight; but, in the present case, there is not so much as a suggestion of this kind, and besides too, she brought a considerable fortune in marriage.

The main argument in *Lord Coventry's Case*, 2 P. Wms. 222, Stra. 596, 9 Mod. 12 (s. c. *Maxims in Equity*, last case), was, that there was a non-execution of the power, but there has always been a distinction between a non-execution, and a defective execution of a power.

Here the declaratory clause in the last deed has supplied any defects that might be in the former, and the natural consequence of this is, that the parties waive all benefit which might accrue to them from the other settlements, and are contented with the provision that is made pursuant to the power.

That clause which impowers the son to hold the estate, provided he pays £600 *per annum* neat to the trustees for the wife, is not within the power, and consequently void, and no conveyance can be pursuant to the power, but what is to the wife herself only.

I must therefore decree that the plaintiff is entitled to have the said £600 made good out of the lands in question according to the power in the settlement of the 23rd July, 1715, Reg. Lib. A. 1739, fol. 278; that Michael Hervey, and the other defendants the trustees, do convey and assure to the plaintiff, a jointure not exceeding £600 *per annum*, and that the Master shall out of the manor subject to the power, take such lands as shall be sufficient for that purpose, but to be made liable to taxes, repairs, &c., in the same manner with other landed estates, and the plaintiff to hold and enjoy the said lands against the defendant, and all other persons during her life.

This cause was reheard on the 21st of July, 1740.

Mr. Noel counsel for the defendant Michael Hervey argued, That as the portion which the plaintiff brought in marriage, was only £2000, that the settlement of £300 *per annum* is much more than adequate to that fortune.

He insisted that the first settlement is such an appointment, both in law and equity, as is a full and absolute performance of the power reserved under the settlement, made upon the marriage of the defendant Michael Hervey, and therefore that the second deed, executed after the marriage of Edward Hervey with the plaintiff, ought to be considered as merely voluntary.

The conveyance to the intended wife under the first deed was to trustees; it has been objected that it ought to have been a [565] legal conveyance of a legal estate to the wife herself, and therefore the conveyance to trustees is improper.

To which I answer, that by the power the father was to have a liberty of making such a jointure or provision, as did not exceed the rents and profits of an estate of £600 *per annum*, and though, as an express estate has not been limited to the wife herself for life, it is not properly a jointure, yet in this Court, by way of provision, it may be construed a due performance of the power.

For, First, It is a good execution of the power at law.

Secondly, If not good at law, it is certainly in equity.

Under the deed of 1725, it was agreed between Edward Hervey the father, and his intended wife the plaintiff, that after the rent-charge of £300 a year out of an estate of £600 a year, the residue of the rents and profits should go to his son the defendant Michael Hervey.

Therefore, as these are parties able to contract in a Court of equity, this must be considered as good, by way of agreement, and any further addition which the wife had after the marriage, must be considered merely as a bounty, and for so much she is only a volunteer.

He cited *Scrope v. Offley* (4 Bro. P. C. 237), in the House of Lords, the 24th of March, 1735-6, in order to show, by that case, that the Court, where a wife is provided for before, will not aid and assist the defective execution of a power under any second settlement.

I do likewise insist, that the trustees were equally trustees for Mr. Michael Hervey the son, as for the wife of Edward Hervey

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the father, and that, as the estate was then out of the father and in the trustees, if they had conveyed according to the trust, it would have been no breach of their duty.

The second settlement gives a rent-charge of £600 a year, which is bad in substance, because it is impossible an estate of £600 *per annum* in land, can produce a neat sum of £600, and where a person has exceeded all bounds of his power, I do not know that this Court hath, in any instance, reduced that excess within the true limits of the power, but has been always held a void execution of the power.

It has been objected, that the wife claimed part as a volunteer, and part as a purchaser, and therefore it would be hard to say, in a Court of equity, that when a person is allowedly a purchaser for part, this Court will not supply the defective execution of a power.

To this I answer, that under the first settlement, the plaintiff was certainly a purchaser for a valuable consideration, by virtue of her fortune of £2000, but that the settlement of 1731 is separate and independent from the former, and she was there only a volunteer.

The case principally relied on by the other side is *Tollet v. Tollet*, 2 P. Wms. 489, but there is a very material one for the defendant, and which was not mentioned at the former hearing, the case of *Lager v. Cotter*, 1 P. Wms. 623, and heard before [566] Lord Chancellor KING in 1731, where it is laid down, that equity will aid a defective execution of a power, provided it is for a valuable consideration.

Upon the whole, he insisted that the present is a new case, and no authority whatever cited that comes up to it.

Mr. Wilbraham of the same side : —

The question is, Whether the first settlement is good in law and equity.

Secondly, If it be good in law and equity, whether this Court will supply a defective execution of a power, under a second or third settlement, where they are undeniably bad in law; he cited the case of *Newport v. Savage*, before Lord Chancellor TALBOT, and *Thwygates v. Dye*, 2 Vern. 80, to show, that where a person has a power of charging lands to such of his children, and in such shares and proportions, as he by any writing shall appoint; he may not only limit the land to any of his children, but may charge the lands with any rent-charge, or sum of money, for any of his children.

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£80 *per annum* rent-charge is looked upon by conveyancers as a reasonable provision for a portion of £1000, and if the settlement in the present case had been £320 *per annum* clear, it would have been double the provision that is usual for it; being four times £80 *per annum*.

Mr. Attorney-General for the plaintiff said:—

That under the settlement, in which Mr. Hervey the father reserved this power, he may be called a purchaser of it from the son, the defendant Michael Hervey, because he absolutely gave up an estate, in which he had his life, to the son immediately in possession.

It is admitted by the counsel on all sides, that the power is not well executed in law, under the settlement of 1725, therefore the execution of the power is void, but equity will supply a defect in the execution, and cited the case of *Kettle v. Townshend*, 1 Salk. 187, where it was held, that equity will supply a defect, in favour of a son or daughter, and that it is not material that such a son was provided for before, nor how far.

Mr. Murray of the same side:—

This is a power that may be executed piece-meal, part at one time, and part at another.

If a wife had any former provision, that is defective under the execution of a power, the counsel for the defendant take it for granted, without producing any instance, or even a *dictum* of the Court, that equity will not supply any defect in a latter provision for the benefit of a wife.

He cited the case of *Watts v. Bullas*, 1 P. Wms. 60, to show that a voluntary conveyance made to a brother or the half blood, though void and defective at law, will be made good by a Court of equity; and that as the consideration of blood would at common law raise a use, and as before the statute of the 27 Hen. VIII. such *cestui que use* might have compelled an execution of the use in a

Court of equity, so would this imperfect conveyance raise a [567] trust, and consequently ought to be made good in equity.

LORD CHANCELLOR. — As this case is attended with some particular circumstances, I am not sorry it has been re-heard; for if I had seen any reason to have changed my opinion, I should not have been ashamed of doing it, but after hearing it fully argued on the part of the defendants, I still continue of the same opinion.

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I will not repeat what I said before, but rather apply myself to give an answer to what seems to be the principal reason urged for a re-hearing.

The general argument is, the validity of the first settlement, at least in a Court of equity; but I take it to be clear, that the deed of 1731, which is the ultimate attempt towards the execution of the power, is a waiver of the former settlements, and supplies any defects that might be in the other two.

In cases of aiding the defective execution of a power, either for a wife or a child, whether the provision has been for a valuable consideration, has never entered into the view of the Court; but being intended for a provision, whether voluntary or not, has been always held to entitle this Court to give aid to a wife or child, to carry it into execution, though defectively made.

I am of opinion, if this power had been executed in favour of a stranger, it would have been good; but being merely an equitable thing, the person claiming must have come into a Court of equity.

With regard to the deed of May, 1725, it has been said, the power being completely executed, that it cannot be executed *toties quoties*, but I am of opinion, that the power is not executed either in law or equity.

Supposing it had been defectively executed, and the parties afterwards execute it properly, there is no doubt but the law would look upon the first execution as null and void, and that it might therefore be executed over again.

If there had been words in the first settlement, which showed that Mr. Edward Hervey had fully executed the power, or would have amounted to a release of it, it would indeed have prevented any subsequent execution; but there are no words, except what are usually put in by scriveners, namely, in bar of dower and thirds.

Nothing is to be inferred from the words, the surplus I give to the remainder-man, for they are only of course, and if not expressed, he would have had the surplus by implication.

The case of *Serrop v. Offley* differs *toto calo*, for there a covenant was entered into by the husband for a valuable consideration upon the first marriage, that the issue of that marriage should enjoy, free from any incumbrance done, or to be done, so that he was tied down by that clause.

It has been further urged by the defendant's counsel, that sup-

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posing the £300 *per annum* be not a good and complete execution of the power, yet it is such an execution of the power, as will induce the Court to think a wife, in some measure, provided for under it.

[568] This is relied upon as the strong point. I am of opinion that the rule, as laid down by the defendant's counsel, that a wife or child, who come for the aid of this Court, to supply a defective execution of a power, must be entirely unprovided for, is not the right rule of the Court.

I think the general rule, that the husband or a father are the proper judges, what is the reasonable provision for a wife or child, is a good and invariable rule.

And when a father has done anything extravagant, in either of these cases, the Court does not break through this general rule, when they set it aside, but they go upon a collateral reason, that this extravagant provision, either for a wife or one child only, is a prejudice and injury to the rest of the family, and that one branch ought not to be improperly preferred to the ruin of the rest.

In *Lady Oxford's Case*, mentioned in *Smith v. Ashton*, 1 Ch. Ca. 263, her jointure was decreed good, where the power was not pursued, though only a part of her jointure depended on the question.

I will, in the next place, consider it as if the rule laid down by the defendant's counsel was a right one, and then it will come to this question, Whether she is a wife provided for under the settlement.

And I am of opinion, that as the Court cannot carry it into execution, according to the intent and meaning of the parties, she cannot be said to be a wife provided for.

As this is a power to make a jointure of lands only, not exceeding £600 *per annum*, it was not the intent that the whole estate should be encumbered, for the remainder-man was to have the surplus, which he will not have, if the £300 *per annum* rent-charge should take place, for then the whole will be liable to answer the rent-charge, and by that means the remainder-man will lose his surplus.

But then it has been said, the Court might have taken £600 *per annum*, out of the £900 *per annum*, to answer this rent-charge.

But suppose this estate had lain in the level or marsh grounds,

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there might have been inundations, and then the part so allotted might not even have produced a rent-charge of £300.

This would have been a prejudice too, in respect of subsequent remainder-men; for supposing the £600 a year had, by any accident, proved an insufficient fund, then the arrears of the rent-charge would have run on, and the remainder-man, at least, who stands behind Michael Hervey, would have been injured.

I agree, if there had been no settlement besides the deed of 1725, the Court would have found out some other way to make the provision for the wife effectual, and might, perhaps, have done what Mr. Noel has pointed out, allotted so much of the estate, which was subject to the power, as would have been sufficient to have answered a clear neat sum of £300 annually, making an allowance for landed estates being liable to taxes.

But I am of opinion, whatever the Court might have done under the deed of 1725, to aid and assist the wife, if it had stood singly, and clear of subsequent settlements, yet as the case [569] is now circumstanced, if the Court cannot give her what is agreed and stipulated for, under this deed, they will certainly secure to her what is given under the settlement of 1731.

And as this is a rent-charge, and not such a provision as is stipulated for the wife, she must be considered as absolutely unprovided for, and then she will clearly be entitled, according to the rules of equity, to be aided and assisted in carrying a defective provision into execution.

It has been said, where there has been an excess in the execution of a power, that there are no instances where the Court have assisted to carry such a case into execution. but though there is an excess or redundancy in the thing itself, yet it must be considered only as a defect in the legality; and there are many cases to this purpose, and I will put one: suppose a power to lease for twenty-one years, and the person leases for forty, this is void only for the surplus, and good within the limits of the power.

It is surprising to me, how the person who drew this settlement could mistake, when he had so plain a power for his guide; but he does not seem to have committed blunders so much as wilful mistakes, with a view to try experiments, like Serjeant Maynard's conclusions, in some of the clauses of his will, *valeat quantum valere potest*.

Upon the whole, I am of opinion that the settlement in 1725,

being drawn in such a manner as that the wife could not have what was intended for her, did not annul or defeat the last settlement, and therefore do direct that my former decree shall stand without any variation. Reg. Lib. A. 1739, fol. 507.

Chapman v. Gibson.

3 Bro. C. C. 229-232.

Will. — Intention to fulfil Moral Obligation. — Aid by Court of Equity.

[229] Surrender supplied for a wife against a distant heir not provided for by the testator, though provided for *alimule*

The testator devised "all his estate whatsoever and wheresoever, and of what nature or kind soever," to his wife.

He had only copyhold estate; his heirs-at-law were a nephew and niece, who took no provision under the will, but were otherwise provided for. The estate was not surrendered.

The bill was by the wife against the heir-at-law, praying a surrender of the estate.

Several cases were cited; but as the arguments made use of by the counsel were repeated by his Honour in his judgment, it is not necessary to state them here.

His Honour gave judgment this day (10th Feb. 1791). —

LORD ALVANLEY (MASTER OF THE ROLLS). — Though I have not found any case where a distant heir-at-law has been compelled to make a surrender for the wife, yet I shall not forbear to [230] make the precedent, if I can find a principle. I have looked at all the cases I can, to find on what principle this Court goes in supplying a defect, and altering the legal right: it is this: Whenever a man having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to execute such power, the Court will operate upon the conscience of the heir, to make him perfect this intention. This is an intelligible principle. Very early, where the testator showed an intention to provide for debts, this Court would supply the defect against the heir. This is not to be confounded with the case of the heir's being disinherited by wills not duly executed; there is no will at all; the Court cannot see that there is such an instrument: but wherever there is such a power it has been exercised. The next class of cases are those where there is a natural obligation. Formerly some Judges have thought otherwise;

No. 5. — *Chapman v. Gibson*, 3 Bro. C. C. 230, 231.

but it is now settled that the Court will not inquire into the *quantum* of the provision. It is sufficient, that the testator is acting in discharge of moral or natural obligations; and it is very difficult for the Court to enter into such an inquiry: the father must be the best judge. The question has been whether this is to be done, so as to put a younger child in a better condition than an elder. Now, I take it to be settled, that this is no objection. The father is the judge as to the *quantum* of the provision. But still there remains a case, which I admit has been determined, whether wisely or not I do not say, viz. That the heir-at-law is not to be compelled to supply the surrender, if he is totally unprovided for; at first the word "disinherited" was used in this subject; but I take this not to be so; and this Lord HARDWICKE says, for it is of no consequence whether the provision comes from the father or not. Now, on what principle can the Court have made this exception? It is attended with difficulties to know when the son shall be said to be unprovided for. The principle must be this, that the testator being under an obligation to do an act, we will compel the heir to perfect it; but we will not compel him to fulfil an obligation at the expense of another; and if the testator has totally forgot to make any provision for his eldest son, this shall be an answer to the claim of the wife, or other children. If this be the principle, it remains to be decided whether it can be applied to any person but a child. This idea struck Sir THOMAS SEWELL, in *Brooke v. Gurney*, though that case is not a decision of it. Upon the several cases, the principle may be collected (and satisfactorily I think, except as to the exception of an [231] eldest son provided for). *Hardham v. Roberts*, in 1682, 1 Vern. 132; *Bradley v. Bradley*, 2 Vern. 163. In *Bath and Mountague's Case*, 3 Ch. Ca. 106, Lord HOLR says, that was a power, under hand and seal, to charge the estate with provision for younger children; he made a reversion for the benefit of younger children, not exactly pursuant to the power. "This was held good in equity." I think the execution of a power, and a surrender of a copyhold, go hand in hand, precisely on the same ground. He recognises the principle, that it depended on being the case of a natural obligation: on account of which the Court would interpose. *Kettle v. Townshend*, 1 Salk. 187, where it is said, "not to be material whether the son is before provided for; for the father is the best judge whether the son is sufficiently provided for or

not." And in *Freestone v. Raul*, mentioned in the note to *Watts v. Bullas*, 1 P. Wms. 61 (for which I looked into the Register's book) the same thing was done. Now, as to a grandchild, I cannot see why he should not have the same equity; for the statute of Elizabeth has made it compulsory on a grandfather to provide for him. However, it will be for the Court to determine this matter when the case comes before it. *Watts v. Bullas*, 1 P. Wms. 60, shows that a brother of half blood is not within the case; but that is not material to this point. In *Tollet v. Tollet*, 2 P. Wms. 489, a defective execution of a power was supplied for a wife. In ¹*Ross v. Ross*, 1 Eq. Ab. 124, the surrender was not supplied, because the devise was satisfied by the freehold; that was the ground of the determination; the reason therefore afterwards given, as to disinheriting the brother, was not material. *Cook v. Aruham*, Cases temp. Talbot, 35, the only doubt there was, whether the rule would extend to reversionary interests. *Andrews v. Wall*, 6 Vin. 237, the surrender was supplied. *Hawkins v. Leigh*, 1 Atk. 387, that case does not determine the point, for Lord HARDWICKE thought the will did not pass copyhold: but there is Lord HARDWICKE'S opinion, that the word "disinherison" is not the proper word; but the question is, whether the heir is unprovided for. I have looked into the Register's book, for *Taylor v. Taylor*, reported 1 Atk. 386, and find it rather more in point than as it [232] stands in the book. There two-thirds of the copyhold were given to the wife, though the book does not state it. The fact was, the father purchased in the son's name: the father continued in possession. On the father's death the son took possession, made a will, and died. The copyhold descended on his heir-at-law. It does not appear that any real estate descended on the second son. The bill was brought against the defendant as heir-at-law of his brother the second son: the eldest son insisted, that if the second son took the copyhold as an advancement, it should be brought into hotchpot. Lord HARDWICKE directed the surrender to be supplied: so that here is a case of supplying a surrender against the heir, who took nothing from the second brother. *Smith v. Baker*, 1 Atk. 385, compares the rule to an heir in blood, and no other distinction there made; but surely the right question must be, Whether there is any obligation to provide: for otherwise why should it not be applied for the *hæres factus*? *Hervey v.*

¹ The proper name of this case is *Boss v. Boss*, and it is so cited, 6 Vin. 238.

Nos. 4, 5. — *Hervey v. Hervey*; *Chapman v. Gibson*. — Notes.

Hervey, 1 Atk. 561 (p. 379, *ante*), shows that one branch of a family shall not be provided for by the ruin of another. *Macey v. Shurmur*, 1 Atk. 389. Surrender supplied. *Roome v. Roome*, 3 Atk. 181; *Goodwyn v. Goodwyn*, 1 Ves. 226; *Tudor v. Anson*, 2 Ves. 582. These are all the cases reported on the subject. There has been another case mentioned of *Brooke v. Gurney*; but neither of the points in that case affect this. The same question arose there, but was not necessary to be determined. Sir THOMAS SEWELL had considered the point, and thought it of great weight. The case turned on the words of the will, which were, "all my lands whatsoever and wheresoever, and of what nature, kind, or quality soever, to my wife." The wife acquiesced, from 1763 to 1779. She sold freehold estate in 1763. Sir THOMAS SEWELL determined on the acquiescence, and thought the words of the will sufficient. On appeal to Lord THURLOW, he thought the acquiescence did not bar, but that the words were not sufficient. Now, in this case, is the argument that the heir is unprovided for, an answer to the equity? He cannot be said to be unprovided for, when the father is alive. However, I think this is not material, for, according to the cases, a wife has a right, where there is not an equal moral obligation violated by giving her relief. On the whole, upon principles and cases, I think the wife is entitled to have the surrender supplied.

Decree an injunction to restrain proceedings, a surrender when of age, and day to show cause. Reg. Lib. A. 1790, fol. 513.

ENGLISH NOTES.

The judgment of Lord ALVANLEY in *Chapman v. Gibson* has been generally recognised as laying down the principle on which the Court will aid defective execution.

The following note is appended to *Chapman v. Gibson*, in Eden's edition of Brown's Chancery Cases: —

"The doctrine laid down by Lord ALVANLEY in the present case, as to supplying a surrender for the wife, when the heir was unprovided for, called forth the dissent of Lord ROSSLYN, in *Hills v. Downton*, 5 Ves. 557. It was agreed by both of them, that upon the later decisions it was immaterial how ample or how scanty the provision for the wife might be; and it was also, in effect, admitted by Lord ALVANLEY, in the present case, that a collateral heir, whether provided or unprovided for, has no right to resist the wife's equity. The difference therefore of opinion between those learned Judges (as observed by Sir WILLIAM

GRANT in *Fulding v. Winwood*, 16 Ves. 92), is reduced merely to this, whether a surrender is to be supplied for the wife against an heir unprovided for, when that heir is the son of the devisor. Lord ALVANLEY in some valuable observations written by himself, upon the case of *Hills v. Downton*, which are published by Mr. Sugden, in the Appendix to his Treatise on Powers, 672, appears, notwithstanding that case, to have retained his former opinion, observing, that if the case of a son wholly unprovided for were to come before him, he should hesitate, notwithstanding the great authority of the Lord CHANCELLOR, to make a decree against him. The line of argument adopted by Lord ALVANLEY is so convincing and satisfactory that it is probable that whenever the Court has to decide between the two conflicting opinions, his will be adopted. The ground upon which the Court proceeds, is, that where the will expresses an intention to do that which legally and morally the testator ought to do, so simple a form as supplying the want of a surrender shall not impede the performance of that duty. Hence the heir will be compelled to make good the disposition, if made in discharge of the moral or natural obligation of his ancestor to creditors, wife, and children. But still, as Lord ALVANLEY observed, that had not been done (and as it is submitted consistent with reason and principle, cannot be done), where the heir being a son could show that if he was compelled to make that surrender the consequence would be (he being a son wholly unprovided for), that he would be compelled to fulfil the intentions of his father in discharge of a moral or natural obligation in favour of a widow, or of his brothers and sisters, where it was manifest that he had neglected to discharge the natural obligation he was under of providing for him his eldest son. It appears by the inquiry directed in the case of *Rogers v. Marshall*, 17 Ves. 297, that Sir WILLIAM GRANT inclined to Lord ALVANLEY's opinion. See upon this subject, Sugden on Powers, 347 *et seq.*"

A Court of equity will aid a defective execution in favour of purchasers for value; and where there has been a complete contract for purchase with a donee of the power who has died before execution of any conveyance, the Court will treat the contract as an execution of the power in equity. *In re Dykes' Estate* (1869), L. R. 7 Eq. 337. And so where there has been a contract by the donee of a power to grant a lease. *Dowell v. Dew* (1842), 1 Y. & C. 345. And see *Campbell v. Leach* (1775), Amb. 740; Sugden on Powers, 567, 8th ed.; *Clark v. Smith* (1842), 9 Cl. & Fin. 126, 141.

But equity will not relieve against a defect consisting in an omission or disregard of an essential condition of the power. *Cooper v. Martin* (1867), L. R. 3 Ch. 47; *Hallett to Martin* (1883), 24 Ch. D. 624, 52 L. J. Ch. 804. And where a power is to be executed by will,

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equity will not aid an execution by deed. *Reid v. Shergold* (1805), 10 Ves. 370; *In re Parkin*; *Hill v. Schwartz* (1892), 3 Ch. 510, 62 L. J. Ch. 55, 67 L. T. 77, 41 W. R. 120.

AMERICAN NOTES.

It is well settled in America that equity will aid the defective execution of powers, but will not interfere in cases of total non-execution. *American Freehold Land Mortgage Co. v. Walker*, 31 Federal Rep. (U. S.) 103; *Mitchell v. Denson*, 29 Alabama, 327; *Lines v. Darden*, 5 Florida, 51; *Howard v. Carpenter*, 11 Maryland, 259, 282; *Lippincott v. Stokes*, 6 New Jersey Eq. 122; *Mutual Life Ins. Co. v. Everett*, 40 New Jersey Eq. 345; *Schenck v. Ellingwood*, 3 Edwards' Chanc. (N. Y.) 175; *Morriss v. Morriss*, 33 Grattan (Va.) 51; *Freeman v. Eacho*, 79 Virginia, 43.

There is also another marked instance of the application of the remedial authority of Courts of equity, and that is, in regard to the execution of powers. In no case will equity interfere where there has been a non-execution of a power as contradistinguished from a trust; for if a trust be coupled with a power, there (as we shall presently see) the trust will be enforced, notwithstanding the force of the power does not execute it. But if there be a defective execution or attempt at execution of a mere power, there equity will interpose and supply the defect, not universally indeed, but in favor of parties for whom the person intrusted with the execution of the power is under a moral or legal obligation to provide by an execution of the power. Thus such a defective execution will be aided in favor of persons standing upon a valuable or a meritorious consideration; such as a *bonâ fide* purchaser for a valuable consideration, a creditor, a wife, or a legitimate child, unless indeed such aid of the defective execution would, under all the circumstances, be inequitable to other persons, or it is repelled by some counter equity." 1 Story, Equity Jurisprudence, 13th ed. sect. 169.

In *Mutual Life Ins. Co. v. Everett*, *supra*, lands had been conveyed to C. in trust for E., with a provision that C. should convey the lands to any one designated by E., either by a writing executed during her lifetime, or by will. C. died before any exercise of the power. Later, E. verbally requested C.'s heir to convey to her, which was done. E. then sold the land to a person under whom the complainant claimed. It was held that the Court would aid the execution of the power, which was only formally defective; and would perpetually enjoin E.'s heir from bringing ejectment.

In *Freeman v. Eacho*, *supra*, property was settled on Mrs. E. for her separate use, with power by a writing under her hand and seal, attested by two witnesses, to direct her trustee to sell or encumber it. Later, by a writing with a scroll annexed, but not recognized as a seal in the body of the instrument, she directed the trustee to, and he did, execute a trust deed to secure two notes held by H., a purchaser for value. It was held that it was a case of defective execution, which equity would relieve. The Court said that defective execution of a power by a married woman will be aided just as if she were *sui juris*.

But in *Mitchell v. Denson*, *supra*, the Court held that there was neither an

Nos. 4, 5. — *Hervey v. Hervey*; *Chapman v. Gibson*. — Notes.

execution of the power, nor such an attempt to execute it as equity would aid. The facts of the case were that a tenant for life, with power of disposition at her death, asserting that she intended the property for her only daughter, consulted a lawyer to ascertain whether it was necessary for her to make a will in order to dispose of the property, and was advised that the property was vested in her absolutely in fee simple. Relying on this advice, she made no disposition of the property, as it was alleged she would otherwise have done.

As to the nature of the defects which will be remedied in equity, the language of Judge STORY is pertinent. "Relief will be granted not only when the defect arises from an informal instrument not within the scope of the power, but also when the defect arises from the improper execution of the appropriate instrument. All that is necessary is, that the intention to execute the power should clearly appear in writing. Thus, if the donee of a power merely covenant to execute it, or by his will desire the remainder-man to create the estate, or enter into a contract not under seal to execute the power, or by letters promise to grant an estate which he can execute only by the instrumentality of the power,—in all these and the like cases equity will supply the defect." 1 Story, Equity Jurisprudence, 13th ed. sect. 172.

In cases of this sort equity will lend its aid in favor of a purchaser. *Schenck v. Ellingwood*, 3 Edwards' Chanc. (N. Y.), 175: a creditor, *Beatty v. Clark*, 20 California, 11, 35; a charity, *Pepper's Will*, 1 Parsons, Select Cas. (Penn.) 436; and in general, in favor of any one whose position is meritorious, as a wife, or a legitimate child. "It may be stated, as a general rule, that mere volunteers will not be assisted, but that aid will be given to purchasers for value, mortgagees, lessees (for mortgagors and lessees are purchasers *pro tanto*), creditors, and persons who have a meritorious standing. In this last class are included a charity, a wife, and a legitimate child, but none others. Thus, the execution of a power will not be aided in favor of a husband, an illegitimate child, a grandchild, a father, a mother, brother, or sister, a nephew or niece, a cousin, or a settlor defectively executing a power in his own favor." Bispham's Principles of Equity, 6th ed. sect. 194.

In *Breit v. Yeaton*, 101 Illinois, 242, it was held that a defective execution of a power by a wife cannot be aided in equity in favor of her husband. The restrictions as to the form and mode of exercising such a power are made for the protection of the wife against the husband, and are matters of substance, and not of mere form. Equity will never aid the execution of a power when the defect is a matter of substance.

Equity will not aid an alleged execution which is in plain disregard of the terms of the power. Thus if one who has a power to appoint by will, attempts to execute it by deed, it is not a case of defective execution which will be remedied in equity. *Bentham v. Smith*, 1 Cheves' Eq. (S. Car.) 33; *Ginskins v. Finks*, 90 Virginia, 384; 1 Story, Equity Jurisprudence, 13th ed. sect. 173.

In some cases a distinction has been drawn between a power created by a party and one created by law. Thus, in *Bright v. Boyd*, 1 Story (U. S. Cir. Ct.), 478, an administrator sold land before he had given his bond. It was contended that this was remediable in equity, but the Court held not. On

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page 487, STORY, J., said: "This is not the case of the defective execution of a power created by the testator himself, but of a power created and regulated by statute. Now, it is a well-settled doctrine, that although Courts of equity may relieve against the defective execution of a power created by a party, yet they cannot relieve against the defective execution of a power created by law, or dispense with any of the formalities required thereby for its due execution; for otherwise the whole policy of the legislative enactments might be overturned."

See also *McBryde v. Williamson*, 29 Alabama, 662; *Smith v. Bowes*, 38 Maryland, 463; *Williams v. Cudd*, 26 South Carolina, 213.

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(1750.)

RULE.

THE instrument executing a power — so far as it is operative — takes effect as if the expressions used therein had been incorporated in the instrument creating the power; but the effect must also be considered having regard to the nature of the executing instrument; so that, if it is a will, it is ambulatory, and where the will is made in favour of a person who dies in the lifetime of the testator, the gift lapses.

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2 Vesey, Sen. 61–83.

Lapsed Legacy. — Power.

[61]

Devise of £30,000 to testator's wife for life, and afterward to be distributed among his children, as she, by deed, will, or instrument in nature of a will, should appoint. She, having married again, appoints by will (*inter alia*) unto two of the children who died in her lifetime: —

Held, that their representatives were not entitled, and that the shares so appointed to them lapsed, and fell into the residue.

Charles, Earl of Sunderland, in 1720, made his will, whereby he disposes of his pictures and furniture at his house, desires his debts and legacies might be paid; gives £30,000 to his wife; and after several other pecuniary legacies, all the rest and residue of his personal estate to his eldest son Robert, Lord Spencer; "except

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such other legacies as I shall indorse on the back hereof, in nature of a codicil in my own handwriting:" making him, Lord Godolphin, and others, executors of his will.

He afterward, by a codicil indorsed on his will without a date, directs the legacy given by his will to his wife should be to her own use and benefit for and during the term of her natural life only; and after her decease to be divided and distributed to and amongst such of his children; and in such manner and proportion, as she by any deed, or will, or instrument of writing in nature of will, should direct and appoint; and for no other purpose whatsoever.

He died in 1722, without revoking, leaving his Countess and seven children.

[* 62] * Upon the second marriage of the Countess, a deed of settlement was made, wherein was an express recital of the will and codicil; and a declaration that the interest of that £30,000 should remain to her separate use; and then an express covenant and agreement on the part of her second husband, that she should have power to make a will concerning the interest and improvement of that sum.

In 1736, her second husband then living, she made a will; thereby reciting that she had before appointed £6000, part of the £30,000, for the benefit of her son-in-law Lord Robert, and £2000, other part thereof, for her daughter-in-law Lady Morpeth, which she intended as part of what she proposed to give her at her death; she says, this is her last will and testament, and that in pursuance of her power and authority given by the will of her husband (which with the codicil she recites), and of all other powers, she by this will gives, directs, and appoints, the remaining principal sum to be paid to the several children of Lord Sunderland in the several proportions after-mentioned: to the plaintiff £2000, to John Spencer £2000, to Lady Bateman £3000, and the residue, which she computed to be £15,000, to Lady Morpeth, on condition that Lady Morpeth should give such a release, as should be tendered by her executors within six months after her (the Countess) death, and discharge all her estate real and personal from the said £30,000, in default thereof the legacy being appointed for her should be void; making Mrs. Poultney her executrix; and dying in 1749.

John Spencer and Lady Morpeth died in her lifetime after her

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making this will. Their legacies were claimed by the plaintiff as being thereby lapsed, as undisposed and unappointed, and therefore part of the residuary estate of Robert, whose executor the plaintiff was: under which right the plaintiff applied to Lord Godolphin, surviving executor of Lord Sunderland, for the payment of those sums; who thought proper to refer it to this Court to settle the several claims set up by the several defendants to this money.

The bill therefore to have £17,000 remainder of the £30,000 beyond these sums which were effectually appointed and given by Lady Sunderland by virtue of her power, was brought against the representative of Lord Sunderland, and of Lady Sunderland, to whom also administration had been granted to William Spencer, younger son of Lord Sunderland, who died soon after his father; there were also made parties Lady Bateman as one of the children; Lord Carlisle as administrator of his late wife Lady Morpeth; the Duke of Bedford as administrator of his late wife another of the daughters; and also the representatives of John Spencer.

[After argument.]

LORD CHANCELLOR (LORD HARDWICKE): —

[73]

As I am satisfied what decree I ought to make, it is not proper to put it off, merely for the sake of putting my thoughts into better order and method.

The general question, who has a right to these two sums of £2000 and £15,000 (as it is computed) appointed by the will of Lady Sunderland, made in execution of a power given by the will of her husband, depends on three considerations. 1st, Whether the representatives of Lady Morpeth and of John Spencer, who died in the life of Lady Sunderland, can claim, or be entitled to these two sums respectively? 2nd, If they cannot, whether these two sums will fall into the residue of the testator's personal estate; or accrue and belong to all the children, and the representatives of such, as are dead? 3rd, If they should belong to the children of testator; then to what species or division of these children; whether to all such as were living at testator's death, and the representatives of those dead, or only to those two surviving at death of Lady Sunderland?

The first depends on two things. First, on the power and construction of the power given by the will of testator; next, upon the act done in execution of that power.

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As to the first, the testator gave the residue of his personal estate, so as to show an intent to dispose of his whole personal estate. As it stood in the will, it was an absolute legacy of £30,000 to the wife. By a writing indorsed on the will, called a codicil, but with no new date (and therefore it may be considered as part of the will), testator restrains that general legacy to her for life only, with power to dispose of it; which is the same as if the whole had been inserted in the will. This power [74] is undoubtedly as large as the testator could possibly give to her, as to the instrument by which she was to execute; but not large in respect of the objects; as to whom she is restrained to and among the children. One side contends, here is no gift by the codicil, but to the wife for life with a power. The other, that a gift is made to all the children of testator, subject to the power of Lady Sunderland, by such an instrument as is described, to divide and distribute among them, so as to exclude some, if she pleased; but if not, that still there is a gift to the children; but that last is not the construction of the codicil. What was the intent of testator, in giving this legacy and power, can only be collected from the words of the will and the codicil; and it is plain, from both, that his primary intent was to provide for the wife thereby. To secure the respect and duty of the children to her, he restrains her estate, but gives it to none but to such as she should appoint. It is admitted, that, if taken according to the words, to make any of the children take, there must be an appointment; but the method taken for the defendants to make this a gift to the children, is by insisting, that to make this presumed intent of testator take effect, the words may be transposed. Suppose the word "such" was transposed, I cannot see how it will vary the sense or construction of this clause; for the sense and meaning would be the same, restraining the generality of the former words, making it a gift only to such as she should appoint. But there is no colour to make such a transposition. It is true, a Court of law as well as of equity (and a Court of equity has no greater latitude in construction of wills, and transposing the words thereof, than a Court of law has) will, to make sense of a will otherwise insensible, and to make it take some effect rather than be totally void, often transpose words to attain the intent that on the face of the will the testator had; which was *Luxford's Case*, 3 Lev., where the Court did not make the transposition to let in

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more, or defeat the devisees (which in no case do I know, that the Courts have done) but it was to make the limitation sensible, the words being insensible, and to attain the meaning; but in no case, where the words are plain and sensible, is a transposition made in order to create a different meaning and construction; much less to let in different devisees and legatees in a will; which is a very different thing from the case, where the persons to take are certain, and the question is only concerning the construction of the words to create the limitation or interest to be taken. But these are plain words; there is no designation to take under this will, but such of the children as she should appoint; and no person can be ascertained under this will until she has made such appointment. Indeed the words want no construction; and if the Court should put a different construction, and transpose, as contended for the defendants (which still could not do for them) it would be making a new will; for testator intended none of the children should take but from the appointment of Lady Sunder- [75] land; and in this it is like the case cited out of Latch, 10.

(*Daniel v. Uply.*) Therefore I am of opinion, that by this codicil, or this part of the will comprised in the indorsement, here is no gift to the children of testator, otherwise than as they might take by execution of the power by her; and consequently the legacy is a mere gift to her for life, with power to dispose, &c.

This leads to the other part of the consideration of the first question, viz., the act done by her in execution of the power, and the consequence thereof.

She had several ways to execute it, by deed or instrument in writing, or by a proper will; but I am of opinion, whichever way she took, to make any of the children of testator take by virtue of it, it must be a complete act done by her; and that an imperfect act in execution of this power would not make any part of this money vest in any of the persons to take under it; for it is admitted by defendant's counsel, there is no purchaser, no greater merit in one than the other; all being volunteers; and therefore no ground to supply any defect in the execution of the power. She has chosen to execute it by will; and two of the appointees therein dying afterward in her life, the question is, what under these circumstances is the effect of the execution of the power as to them; whether their representatives can take the sums appointed? To determine it, one thing is necessary to be

settled, viz., the nature of the instrument by which the power is executed. The plaintiff insists, it is by a will: the defendants, that it is not by a proper will, for that she was a *feme covert* at the time; but by an instrument in writing, which may have a different effect from a will. I am of opinion, that this act of hers in execution of her power must be considered as a will, and may be truly so as a proper will in this cause: but if not, still it may as a writing in nature of a will, and then it will come just to the same thing as to the present question. A *feme covert* may make a proper will, proved in the ecclesiastical Court, with the assent of her husband, according to the express resolution of *Marriot v. Kinsman*, Cro. Car. 219, where it came in question upon a bond in pleading. Then, whether there has been such assent in this case, depends on the deed of settlement made on her second marriage. I am of opinion, it does amount to a sufficient assent to her making a will concerning this £30,000. It is said barely to relate to the interest; if it had done so, when there is an express recital of the will and codicil, and the principal and interest arise under that will, and she was only to take the interest, I should have thought, it was an assent to a complete will; but it goes farther; for the word "improvement" does not take in interest only, but improvement of the capital, which is part of the principal, and would go to be divided as the principal; for it is established, that the increase and rise in value of the principal [76] shall go as the principal, and not go to the tenant for life in being. But, supposing this not a proper will, still it must be considered as an instrument in nature of a will; which shall have the same consequence as if a will, according to the construction of the Court. Then taking it either way, as a proper will or instrument in nature of a will, I am of opinion, that neither the representatives of John Spencer or Lady Mompeth could take anything by this execution of the power, unless it vested in their testator or intestate, only derivatively, and through them. It is certain, that an executor or administrator cannot take by virtue of that representation anything but what first vested in the testator or intestate: which brings it to the question, whether by this execution of the power anything vested in them in their lives. It is plain, that by virtue of a will or instrument in the nature of a will, no legacy or gift can vest till death of testator: and admitted, that if this was a gift of Lady Sunderland and a legacy from her, so

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that the children were to take by or under her, it would be so; for then it is admitted, the will is not complete till death of testator; but it is insisted, that this being in execution of a power, nothing is taken under the instrument, by which the power is executed, or under the person executing, but under the giver of the power, and as legatees in the will of the testator; which is true to certain purposes, but holds not to the extent contended for on the part of the defendants, that is, not to show that these two legacies or sums of money vested by virtue of the execution of this power in the children in their lives; for to that only can it be material. There is no case, where that has been said to be under a will; whether that will operates by way of giving a legacy or interest derived from the testator in that will, or by way of execution of a power, or instrument in nature of a will, which is the same; for still it is a testamentary act, and the law says, that a testamentary act is only inchoate during life of testator, from whose death only it receives perfection; being till then ambulatory and mutable, vesting nothing, like a piece of waste paper, according to the doctrine in *Bret v. Rigden*, Flo. 345, where Manwood does not argue, that the will could have effect during life of testator, but only that the heir should take by purchase as devisee in the will, that the will might take some effect. The cases put for the plaintiff are very material, viz., of a will of land in execution of a power, and the word "will" generally used (which before the Statute of Frauds would be sufficient, if it was a will not executed by any witnesses), it is determined, that a will to pass lands by virtue of a power must have the requisites in that statute. It is the same as to a power to appoint personal estate by will; unless there are other words, which are contended for to give a larger manner of executing the power, it must be such a will as will pass personal estate. So is the case of copyhold lands very material; not that there is any authority; but as it is a thing which must have often happened. Copyhold lands are surrendered to the use of a will; the surrenderer makes a will, and ap- [77] points the uses thereof: the law says, the lands pass by the surrender, and the will is only directory of the uses: though the lands are so appointed, if the appointee died in life of testator, it was never thought he could take benefit of it; which must have often happened, considering the number of such wills, and yet it was never contended, that it would vest in appointee dying in life

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of testator, because the act was not complete; it being no will till his death, and consequently at the time it should vest there is no person to take. So if a power is given by deed to appoint lands by will, and the person to whom the power is given, makes a will, and gives the lands to A. and his issue, the law says, that, though such appointee takes under the power, yet, the execution of the power being by will, it shall receive the same construction as if a devise of lands, viz., an estate-tail. So if it had been to A. forever, that would have been an estate in fee. It was never doubted, but that the construction of the words would be the same exactly, as if he took strictly and properly under the words of a will; and indeed it is repugnant to the nature of the instrument, that any person should take, or have anything vest, by will in life of the testator; and every person claiming under the execution of a power, must claim not only according to the power, but the nature of the instrument by which that power is executed; and therefore a will in execution of such a power (suppose it was of lands) would be alterable or revocable according to the Statute of Frauds by cancellation or any of those methods, as a proper will would be; because it is the nature of the instrument which causes that. Suppose such a power was to be executed by deed only, it might be as well said, that the party to take under the execution of that power should take by an incomplete deed; as in this case by a writing not complete till death of testator; there being as great an imperfection in one case as the other. If this was to be taken as an instrument in writing generally, and to have the same effect, as if she had made such a common instrument without calling it a will, appointing this payment after her death, as has been argued, that would change the nature of the instrument, and the intent of Lady Sunderland; the consequence would be, that it would be irrevocable; for it is revocable only by the nature of the instrument itself; but turn it into another instrument, neither a will nor instrument in writing in nature of a will, it is not revocable; for it is determined, that notwithstanding under such a power she might have executed it *toties quoties*, have reserved a new power to herself, and might revoke, yet if she does not reserve a new power, it is irrevocable; which was the resolution of all the Judges in *Hele v. Bond* (Sug. Pow. 908, Ch. Pre. 474) in the House of Lords. There Hele had a power in a deed to revoke, and appoint new uses as often as he pleased; he executed a deed, and revoked, and so a

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second and third time; and the question was, whether this last revocation was good? It was held not good for want of an express revocation; that this power amounted to no more than a common power of revocation expressed in a great number of [78] words; and therefore the party could not revoke *toties quoties* by virtue of this original power of revocation; but it enabled him to insert a new power of revocation, if he pleased; which not having done, he had executed his power. So if I should hold this paper to be neither a will nor instrument in nature of a will, it would be an instrument irrevocable by her; which would undoubtedly be contrary to her intent. It is only revocable from being a will or in nature of a will; and if so, it is equally incomplete till her death; consequently nothing could vest in either of the legatees till her death; at which time, it is a principle of law, there must be a donee or appointee to take; whereas here they were not then *in rerum natura*, and consequently no legatee, donee, or appointee (call it which you will) to take at the time the thing was to vest. From this construction of this paper the case in Hob. of *Kibbot v. Lee* is material, viz., that this, whether as a will or instrument in writing in nature of a will, is a declaration in law of Lady Sunderland, that it should take effect only from her death. But to this it was said, that in the present case it is otherwise; because the appointee must take under the power, and as if named in the power, and that it was a gift of the testator in his will, she being only an instrument; that the whole reverts back to the power, under which merely they take, which relation will over-reach the death of these two parties, both being living at the death of testator, and then it may be considered as vesting in them in their lives, which I deny. I admit the principle, that, where a person takes by execution of a power, whether of realty or personalty, it is taken under the authority of that power, but not from the time of the creation of that power. There is no case, that the relation shall go back for that, which is quite of another nature; and that is the point, which must be contended for here, that they must take by relation so as to make them take from the time of the creation of the power, for which there is no authority, and that would be unreasonable. The meaning that the persons must take under the power, or as if their names had been inserted in the power, is, that they shall take in the same manner as if the power and instrument executing the power had been in-

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corporated in one instrument; then they shall take, as if all that was in the instrument executing had been expressed in that giving the power. So is it in appointments of uses. If a feoffment is executed to such uses, as he shall appoint by will, when the will is made, it is clear, that the appointee, *cestuy que use*, is in by the feoffment; but has nothing from the time of the execution of the feoffment so as to vest the estate in him. The estate will vest in him according to the nature of the act done, and appointment of the use from the time of the testator's death. This there-

fore is not a relation so as to make things vest from the time [79] of the power, but according to the time of that act executing

that power; not like the referring back in case of assignment in commission of bankruptcy; that is, by force of the statute, and to avoid mesne wrongful acts. The case was put of a bargain and sale, which was said to be like this of a will or instrument in nature of a will. A bargain and sale, when acknowledged and enrolled, has relation to the time of execution; and if the grantee dies within six months, and afterward it is acknowledged and enrolled, it is good; that is, because it is a collateral act required by Act of Parliament, and not arising from the nature of the instrument itself. Consider the consequence, if this was otherwise: that by such a will or instrument in nature of a will, executing such a power, anything should be held vested in testator's life, and that the reference to the power should not only be a reference to the substance of the power, but to the time of creation; it might be as well said, that Lady Sunderland might have appointed this money to them if they had died before her making the will, for it is just the same thing; and the case of the bargain and sale, if applicable, would hold equally; then the consequence would be, that she might execute this power by giving all, or greater part to herself; for she was representative of her son William, who died before her will; and it would be absurd, that powers of this kind should be executed for benefit of a person dead at the time of executing. But it is contended, that there is a great difference between powers, and that this shall have effect in this manner, because it is a naked power, these sums being never part of her property, who was only an instrument: so that whatever execution, it would have this effect, though contrary to the nature of that paper itself: that the quality and nature of the will should be out of the case, and considered barely as an instrument

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in writing; though it is allowed, that where a power is coupled with an interest, the party should be considered as disposing of the interest, and it should have another effect. This is the first time I have heard, that the execution of naked power should be construed more favourably than that of powers coupled with an interest. The rule of law is otherwise; because the party there in some measure parts with his own property, as a kind of dominion he has over the estate, those powers being construed liberally; but naked powers always strictly. It is farther asked, where is the difference? That it being admitted, she might have done this by deed or instrument in writing, not calling it a will, and might have annexed a power of revocation so as to enable her to revoke that, and to execute the power over again, this amounts to the same; but that is not *ad idem*. If she had executed this power by deed or instrument in writing, though with a new power to herself, the consequence would be, the instrument was complete in itself; the thing would have vested from the time of the execution of that instrument; and the power of revocation would have no effect but to leave it mutable during her life. But there [80] is a vast difference between a deed or instrument with power of revocation and a will. The first is a complete act; a will not so, death being necessary to the completion, as well as to make the thing pass; and really, if in questions of this kind such execution of powers by will were to have this construction, and to make anything vest in the testator's life, so that a person dead at the consummation of the will might take thereby; in nineteen cases out of twenty it would be contrary to the authority of the power, and intent of the person executing (this I mean in general, not as to the present case); for consider, what a person does, when making a will; Lady Sunderland must know, that she ran no hazard, because the instrument was revocable till her death; but if a Court of justice should, contrary to the nature of the instrument, hold, that, though the party dies in the life of the person executing the power, it will vest in the executor or administrator, that may be in a mere stranger both to the author of the power and the person executing. That would be the consequence; like the cases of wills obtained from young persons by surprise; as from a young lady at a boarding-school (an instance of which I remember in this Court), the master getting her, she being above seventeen, to make a will, and him executor: so if this would be good notwith-

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standing the dying in life of testator, it would make it go to a stranger. But it is said, this has been determined, that such an execution of a power by will may be good to make it transmissible to the representatives of the person dying in life of testator; for which is cited *Burnet v. Holgrave* (Eq. Abr. 296, 1 Ves. Sen. 140); and if it had not been for that, I should not have spent so much time about this. But if that case is considered, it is no authority against the opinion now given, or that I gave in *Oke v. Heath* (1 Ves. Sen. 135); for there the person executing the power was not limited in respect of the objects. It was a general power, to such as she should appoint. She appointed to her second husband, who died in her life, and made her executrix, so that it was really come back to herself, and her representative claimed it under the execution of the power. That was a case to tempt a Court of justice to go as far as possible to make it good; because it was come back to the person, and the same thing as if given to her own benefit; and the Court only supported that in her, which was really originally given for her benefit. It was no doubt in her power to appoint her executors originally, if she pleased; because she might do it to any person whatever; and there the Court might consider that word executors so as not to take by representation, but as a description of the person to take; and there is something in the case which favours that. It is imperfectly reported in Eq. Ab. Executors may certainly be made use of either in a deed or will as distinct and separate persons from testator; which is the case of a special occupant, 2 Roll. Ab. 151, where the executor shall be special occupant;

which shows, executors may take by that name as distinct [81] persons, and not in representation of the testator. The

Court cannot be sure on what Lord HARCOURT went in that case; yet there was room for that from the words; and all ways were to be taken there to support it, as it was to be considered, as if originally given for her benefit. But whether that be so or not, it is a single authority, and was a cause heard by consent; which certainly weakens its authority, as it proves it in general not to be so fully considered; and commonly there is a disposition in the parties to give way to what the Court thinks equitable; nor is there that opposition as in other cases. Therefore on the whole, upon this first point, I am of opinion, nothing vested by this instrument in John Spencer or Lady Morpeth during their lives,

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and consequently nothing is transmissible to their representatives; and to make it do so would be contrary to the principle of law, that the person must be in being at the time the thing is to vest.

Which brings it to the next question, whether these sums will fall into the residue of testator's personal estate, or accrue to his children? And, whether it shall accrue to all his children and their representatives, depends on the question at first considered, the construction of the clause in the codicil, viz., whether anything is given to the children of the testator *eo nomine*, otherwise than by description of such as she should appoint to, and consequently nothing to vest in them abstracted from her appointment. It would be very difficult to determine in what they should take, or how it would vest, if that was to be the case. The portions as well as the gift were to be settled by Lady Sunderland, who has given in her life several parts to several of them. What shares were to vest? Were they to take as joint-tenants? that is denied by the representatives of the deceased children, because that would exclude them, and make it to the survivors. If to take as tenants in common, what are the shares? The settlement of the proportions and shares was to be by Lady Sunderland. None can take as tenants in common of uncertain, though they may of unequal shares, and if there was anything in this so as to make them take as children of the testator, I should incline, that they should take as joint-tenants, and consequently it should survive. No words of division or distribution are made use of by the testator but by way of reference to the division and distribution to be made by Lady Sunderland; so that it is part of her power only, and not distinct from her power, that imports a division between them as tenants in common. And how could it be? If all were to take this remaining £17,000 equally in proportion among them as tenants in common, there would be an unequal proportion thereby among them; for Lord Robert's share, having £6000 given him, would be made more, which would be contrary to the construction attempted on this. But I found myself on this, that this is no gift to the children; and consequently the children cannot take as such. The next question then [82] is, if the residuary legatee can take it; for then the plaintiff, representative of his brother, stands in his place, and will be entitled? The objection to this is, that the exception takes out of the residuary bequest this whole £30,000 being indorsed in his

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hand; therefore contended, that it must be considered, if not well appointed, as something undisposed of by the will of testator, and consequently must be distributed. But it has not been mentioned how it should be distributed; for if so, the mother must come in for one-third part of that distribution; whereas the counsel for her executrix have not insisted thereon; nor can it be contended that the intent was to leave it in her power to make no appointment, and so be entitled to one-third; which would be the consequence, if this was the construction. Not that I suppose the testator had any distrust in her, and she has acted very honourably, giving away part in her life; but the putting this case shows no presumption can be of that kind. But if the will is so, it must have its effect. Here is a clear intent in this will to make a disposition of his whole personal estate; and it is pretty strange, if that should be the construction, that, where one has made a residuary legatee of all the rest, he should die intestate as to part. There may be possibly such a case; and for this was cited (*Darvers v. Dewes*) 3 P. Wms. 40. But this differs widely from that, which was a reservation of particular specific things, as goods, &c., consequently the things themselves were absolutely taken out of the residuary bequest; and the Court thought there was no ground to insert them in it. That is not the case here; the testator has given this legacy by his will. Supposing Lady Sunderland had died in the life of testator, that £30,000 would have gone into the residue as lapsed notwithstanding this exception. No legacy at all is given by the codicil; he has restrained his wife's legacy, which was absolute, to a gift for life only, but no legacy. Suppose it was to be considered as a legacy, what does it import? Not the thing, but the interest given in the thing. That interest he has given to his wife for life, and afterwards to such as she should appoint, according to such estate and interest as she should appoint. Suppose it was a residuary devise of real estate, and except thereout such devise as shall by codicil, &c., and he should by codicil make a devise for life; the interest is only taken out of the residuary devise; there the word legacy answers to the word devise. Besides this is saying no more than the law implies, it is doing nothing by this exception. If a man gives all his personal estate, it leaves it open to the codicil; which, if made, shall supersede; this exception therefore *nil operatur*. It is like *Hele v. Bond*; there was a power, which might be revoked *toties quoties*, and

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therefore it was said, there might be a second revocation thereby; but the Court held otherwise; that it was only saying by a circumlocution of words, what the law would construe the effect; so here, it is only taking out of his residuary devise such an interest, as he should give by his codicil; which the law would have done for him. Suppose by the codicil he had given the [83] £30,000 to Lady Sunderland, for life, without saying anything of the power; the residuary interest therein would undoubtedly have gone to Lord Robert after her death, and especially when it comes in by the way of lapse. An executor or residuary legatee stands in the same light as an heir, so as to take something falling in without the intent of the testator, as by operation of law. But the negative words are insisted on, that this £30,000 is given for no other use or purpose whatever. I cannot construe these words in that manner, but that they are limitations or restrictions on the power of Lady Sunderland; and, if taken in the large sense, it would make it caduciary; which none can do with his property, so as to make it go to none whatever. No one can say, his lands shall not go to his heirs; who shall have them notwithstanding. So of personal estate, one cannot say, his executor nor his next of kin shall not have it; for he shall, notwithstanding, by the law. So that this is by a reasonable construction to restrain Lady Sunderland, that she should not have power to appoint but to his own children.

Consequently these lapsed legacies will fall under the residuary bequest to the plaintiff as representative of his brother: and there must be a decree for payment, and account of interest from the death of Lady Sunderland.

The next morning his Lordship said, he had forgot to take notice of the cases cited for the defendants; but that one answer to them all was, that they were all cases, where the bequest amounted to a legacy to all the children; as where it was "to be divided among all my children;" it amounted thereto, being still legatory words, whether it was by the word "give" or "desire"; and the person would be obliged by the Court to give something to every one of the children; consequently only the proportions were entrusted to the appointor; the objects were fixed.

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ENGLISH NOTES.

The distinction is sometimes exceedingly fine between the cases where there is a mere power to appoint among certain objects, — as Lord HARDWICKE construed the devise in the principal case to be, — and a trust for a class of objects with a power to divide amongst them. As a representative of the latter class of cases may be taken the case of *Brown v. Higgs* (1799–1803), 4 Ves. 708, 5 Ves. 495, 8 Ves. 561 (all contained in the report in 4 R. R. 323). In this case Sir R. P. ARDEN, M. R., and Lord ELDON both admitted the difficulty of the distinction, but observed that Lord HARDWICKE on the special terms of the bequest did not consider that any trust was constituted, or duty imposed, in favour of the children who were objects of the power.

In *Brown v. Higgs*, a testator bequeathed a leasehold estate to A. upon trust, subject to certain charges, to employ the remainder of the rent to such children of B. as A. shall think most deserving, and that will make the best use of it, or to the children of his nephew C., if any such there are or shall be. A. died in the testator's lifetime; and the question was whether by reason of the power intended to be given to A. never having been executed, there was a lapse of the subsequent devise, or whether there was a trust in favour of any, and what, children of B. and C. It was held that there was a bequest in favour of all the children of B. and C., on the principle that the omission or failure of a trustee to exercise a power of appointment entrusted to him to be exercised for the benefit of others is not allowed in equity to defeat their interests; and that in such a case a trust for their benefit may be implied in default of appointment.

In *Wilson v. Duguid* (1883), 24 Ch. D. 244, 53 L. J. Ch. 52, 49 L. T. 124, 31 W. R. 945, the cases turning on the distinction above mentioned are discussed by CHITTY, J., and he considers it to be understood by the profession on the authority of Lord ST. LEONARDS that the decision in *The Duke of Marlborough v. Godolphin*, though a decision of Lord HARDWICKE, would not be followed in the present day; but that a will in the same terms would be construed as creating an implied trust in default of appointment, for all the children of the wife. This conclusion, however, does not appear to have been adopted by ROMER, J., in the case of *In re Week's Settlement*, 1897, 1 Ch. 289, 66 L. J. Ch. 179, 76 L. T. 112, 45 W. R. 265, where the power is not unlike the one dealt with by Lord HARDWICKE. He does not (according to the report) cite *Wilson v. Duguid*; but he refers to *Brown v. Higgs*, and so doubtless had his attention directed to *The Duke of Marlborough v. Godolphin*. On a survey of the cases he comes to this result: "In my opinion the authorities establish no hard

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and fast rule that where there is a gift to one for life with power to appoint among a class, without more, and the will contains no gift over, a gift in favour of the class is to be implied where the power is not exercised. In my opinion, the result of the cases is that you must find in the will an indication of intention that the class, or some members of the class, are to take, — in fact, that the power should be regarded in the nature of a trust, only a power of selection being given; although there are indeed to be found in the cases remarks by various learned Judges which, unless interpreted by the facts before them, may seem to have a more extended operation."

This decision of ROMER, J., is cited and in effect followed by PORTER, M. R. for Ireland, in *In re Hall, Sheil v. Clark*, 1899, 1 Ir. Rep. 308.

AMERICAN NOTES.

To the effect that the estate arising from the execution of a power takes effect as if it had been created by the instrument which raised the power, see *Albert v. Albert*, 68 Maryland, 352; *Burleigh v. Clough*, 52 New Hampshire, 267; *Leggett v. Doremus*, 25 New Jersey Eq. 122; *Bradish v. Gibbs*, 3 Johnson's Chanc. (N. Y.) 523, 550; *Smith v. Garey*, 2 Devereux & Battle's Eq. (N. Car.) 42; 4 Kent's Commentaries, *337.

In *Bradish v. Gibbs*, *supra*, where a woman who had a power under a marriage agreement of appointing her real estate by will, appointed it to her husband, Chancellor KENT, in the course of an opinion holding that the husband could not be regarded as a volunteer, said: "The principle is well established (*Marlborough v. Godolphin*, 2 Vesey, 78) that where a person takes by execution of a power, he takes under the authority of that power. The meaning is, as Lord HARDWICKE expresses it, that the person takes in the same manner as if the power and instrument executing the power had been incorporated in one instrument, and as if all that was in the instrument executing had been expressed in that giving the power. Now, the marriage articles are founded on the consideration of marriage, which is a good and valuable consideration; and the provision in the will is founded on the same consideration as if it had been a part of the original ante-nuptial contract. The party who claims under the execution of a power makes title under the power itself."

This principle is not extended so far as to interfere with the intervening rights of third parties. *Jackson v. Davenport*, 20 Johnson (N. Y.), 537. But in *Leggett v. Doremus*, *supra*, it was held that, while a life tenant with power of sale could not exercise the power so as to defeat a previous voluntary conveyance of his interest, the rights of a creditor who obtained a judgment against him were subject to be defeated by an exercise of the power.

The principle that the appointee takes under the instrument creating the power is important in connection with the application to powers of the Rule against Perpetuities. In all cases arising under special powers, the remoteness of an appointment depends on its distance from the creation, and not from the exercise of the power. *Lawrence's Estate*, 136 Pennsylvania State, 354; Gray, Rule against Perpetuities, sects. 514 *et seq.*

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In commenting on the statement that the test of the validity of the estates appointed is to place them in the deed creating the power, in lieu of the power itself, Mr. Gray says (sect. 515): "This does not mean that the language of the instrument executing the power must be read into the instrument creating it. To do this would often produce manifest absurdity, though the limitations were of the most unobjectionable character. Events future at the time of the creation of the power would be spoken of as past; gifts would be made by name to persons not in existence. What these expressions mean is that *no appointment made under a power is good, unless at the time of the creation of the power it was certain that if the appointment was ever made the appointee's interest would vest, if at all, within twenty-one years after lives then in being.*"

An interesting case in this connection is *Smith's Appeal*, 88 Pennsylvania State, 492. There A. devised property in trust for B. for life, and on her death as she should by will appoint. B. appointed to trustees in trust for her children for life, and directed that on the death of each child, its share should go over. All B.'s children had been born in the lifetime of A. The gifts over were held too remote. In pointing out the error of this decision, Mr. Gray says (sects. 523, 523 a): "The Court say that B. might have had children who were not born till after A.'s death. But at B.'s death, when the appointment took effect, her children were a fixed number, which could neither be increased nor diminished; 'children' was simply a compendious designation for certain determined individuals. It will not be questioned that if B. had appointed the property to John, Thomas, Mary, &c., naming all her children, all of them having been born in the lifetime of A., the gift over on their death would have been good; for it would have been good if inserted *totidem verbis* in the will of A. Now that is exactly what she has done: the words of gift to all the children, as used by B., are identical in meaning with words appointing to John, Thomas, Mary, &c. They have not merely turned out the same (which would not be enough), but they could never mean anything else; for at her death, when the words of her will became operative, her children were John, Thomas, Mary, &c., and could never be anybody else. The decision in *Smith's Appeal* makes the question turn upon whether B. used one of two expressions, which, in her will, would have precisely the same meaning; and the reason for this distinction is that the words, if used by A., would not have had the same meaning. . . . The error in *Smith's Appeal* was that the Court went to the creation of the power, not only to determine the validity of the appointment (which was right), but to determine the meaning of the appointing instrument (which was wrong). They considered not what the words of appointment meant as used by the donee, but what they would have meant if used by the creator of the power."

In the case of a general power of appointment, inasmuch as the donee of the power has absolute control over the property, and could appoint it to himself at any time, the remoteness of an estate appointed by him is judged from the time of the exercise of the power, and not from the time of its creation. *Mifflin's Appeal*, 121 Pennsylvania State, 205; Gray, Rule against Perpetuities, sect. 524.

 No. 7. — **Alexander v. Alexander**, 2 Vesey, Sen. 640. Rule.

No. 7. — **ALEXANDER v. ALEXANDER.**

(1755.)

RULE.

WHERE a person purporting to execute a power has done something which is within the power and something outside the power, then, if the things are distinguishable, the execution within the power is good and the excess void; but if the boundaries between the excess and execution are not distinguishable, the execution will be void *in toto*.

Alexander v. Alexander.

(MASTER OF THE ROLLS FOR LORD CHANCELLOR.)

2 Vesey, Sen. 640-646.

Power. — Good and Bad Exercise. — Divisible or Otherwise.

Power to appoint among children will not extend to grandchildren; [640] nor can a discretion be given to another to appoint. But though that would be void, it would not devolve on the Court; which is only where the power is well created, but by accident cannot be executed by the party. Where given to those not capable, together with another, who is capable, the latter will take the whole. Under such a power it cannot be given free from debts of the appointee. Power may be good and bad in part, and the excess only void; where the execution is complete, and the bounds between it and excess clear.

James Alexander by will bequeaths to two trustees £6000, describing particularly the funds of which it consisted, upon trust to pay the interest and produce to his wife for life, and directs them to place the same out at interest with her consent; "and I give unto my said wife the absolute disposal of the said sum of £6000 unto and among such children begotten between us, and in such proportion as she shall by last will and testament, or by any other deed or deeds, writing or writings, to be executed by her in her lifetime, attested by two or more credible witnesses, direct, limit, and appoint;" then directs the trustees to pay the same according to such will or appointment; and for want of such a will or appointment, that the said £6000 should fall into and go in the same manner as the residue of his personal estate: but if his wife

No. 7. — *Alexander v. Alexander*, 2 Vesey, Sen. 640, 641.

should think fit to apply in her lifetime any part of the said £6000 as an increase of any of the portions given by the will to his said children, or any of them, for their better advancement in marriage or otherwise in the world, then the trustees should out of the said £6000 issue and pay such part thereof for the benefit of such children, as his wife should by any writing as aforesaid direct and appoint.

The mother makes her will, there being then five of the children living, she thereby recites her power, and in pursuance thereof gives to her daughter Anne £100 to be paid out of the sum of £5390, which she computed to be the only remaining sum [641] of £6000 after deducting what she had before paid to some of her children; and as to the remaining produce after payment of the said £100 she disposes to her daughter Mary and son James for their own respective use each one full fourth part thereof (the whole into four parts equally to be divided), and to the said Mary and James also the other remaining two-fourth parts; but as to those two-fourth parts upon the trusts following: viz. as to one of the same to place out or continue on securities during the life of their sister, her daughter Catherine, wife of Thomas Clipperton, and to pay the interest thereof to such person or persons and for such purposes as she shall from time to time direct, and in default of such direction into her own proper hands, my will being, that such interest shall be for her separate use and disposal, and not subject to the debts, control, or engagements of her present or any future husband; and upon trust at her decease to pay and apply the principal of such fourth part to such child or children, if any, as she shall happen to have living at her decease, in such manner as she shall by writing under her hand in nature of a will or otherwise appoint; and, for want of such appointment, to such child, if but one, if more to them equally; in default of such child or children the principal of such fourth part, if she survives her husband, to be wholly paid to her for her only use and benefit; but if she dies in his life, the said principal at her decease to go to the said James and Mary, yet for their own respective benefit only as for one-third part thereof to each of them; and as to the other third part thereof, and also as the other of such remaining two-fourth parts, whereof no disposition is herein yet made, upon trust to pay and apply the principal and interest thereof or any part of either from time to time weekly or otherwise in such manner as said Mary and James, their

No. 7. — *Alexander v. Alexander*, 2 Vesey, Sen. 641, 642.

executors, administrators, or assigns, shall in their discretion think most beneficial for the personal support and maintenance of their brother, my son Francis, and his wife and children, but not for the payment of his debts.

Sir THOMAS CLARKE, M. R., said, there were some particularities in the case, and he would consider of it, and the next day delivered his opinion : —

Considering the nature of the power, the wife was confined as to the objects to give it to, but left to her discretion as to apportioning it among them. In consequence of this she was obliged to give the whole among the children ; every child must have some ; such share as she pleased ; provided not illusory ; which has been the language of the Court as to such appointments. If then she might apportion as she pleased, it is necessarily implied in that, that she might apportion it out in such manner as she [642] pleased ; for it is such kind of proportions, as she should think fit ; and therefore the power in the first part of the will does not differ from the latter part, where the word “ manner ” is added : for the first word means kind of proportions. This is the nature of the power ; consequently she might give an interest for life in a particular share to one child, or limit the capital of the same share to another, or even go so far as to limit it to a third child upon a contingency ; provided she doled out the whole in this various way among all the children only. One restriction she was under, that she could not have given any one child merely a reversionary interest ; for it was intended as a provision, and therefore it would be deemed illusory. The power did not require that she should dole it out in gross sums, and give each child an absolute interest in that gross sum ; for which among several other cases *Thacayles v. Dye*, 2 Ver. 80, is a strong authority, that such a power will enable the giving particular interests and to apportion such interest, as a general power of apportioning land itself would. As this is necessarily implied, there is nothing in the objection, that where this is designed, the power is more extensive, and words added.

As this is the nature of the power, consider what is done under it. It is observable, that in consequence of the nature of the power the mother has given to each of the five children then alive a share in possession, not merely a reversionary interest ; which I should have doubted whether it would be good. The £100 to

 No. 7. — *Alexander v. Alexander*, 2 Vesey, Sen. 642, 643.

Anne, and the one-fourth of the residue to James, and the other fourth to Mary absolutely, are undoubtedly good; so is the interest to Catherine for life in the other fourth part; and the giving it to her separate use is so far from being an objection, that it is more strictly carrying into execution the will of the father, a stronger execution of the power agreeably to his intent. But next the provision for the children of Catherine is not a good appointment. The mother had a power to do something similar to this, but in another way: for though that power would have enabled her for better advancement in marriage to make a strict settlement, that is implicitly contained in that power to limit any share she thought fit to give for advancement of marriage, in that way, but she has not taken that method; for she has made a disposition of it by her will, and therefore it must correspond with every circumstance in that will. No case will, under a power to appoint to children, warrant to give to grandchildren; there is a case in point to that, if it needed it in *Vernon*: but it clearly cannot. *Thwaytes v. Dye*

is more like an authority on that side of the question; but [643] that is no authority to contradict the reason of the thing,

that the appointment to the children is bad. Next, as to the contingent interest to Catherine if she had no children and she survived her husband; but in default thereof two-thirds to James and Mary, the other third to go over with the other fourth to Francis: suppose Catherine leaves children at the time of her death, it is impossible any of these limitations over should take effect: it will fall into the residue, because it was no appointment, being only a partial appointment of that fourth, given only to Catherine for life; and the children, though they could not take themselves, would yet prevent the limitation over. But the most material limitation is that given last to Francis, his wife and children. Consider the effect of this appointment: first on a supposition that this discretionary power was good, and had been exercised by James and Mary. It is clear they could not have duly exercised that power without giving a share to the wife and children of Francis: otherwise it is not consistent with the mother's intent: nor can I say they could discreetly have given the whole to Francis; and it is clear that if they had exercised this power to the wife and children, it would have been bad. If they had given anything (as they must something in consequence of their power) it would have been giving so much contrary to the intent and effect of the power:

No. 7. — *Alexander v. Alexander*, 2 Vesey, Sen. 643, 644.

but I am clearly of opinion, this discretionary power was not good; because, if there is a power to A. of personal trust or confidence, to exercise his judgment and discretion, A. cannot say this money shall be appointed by the discretion of B. for *delegatus non potest delegare*. It was determined by LORD CHANCELLOR¹ in *Attorney-General v. Berryman*, Feb. 11, 1752; where a personal estate was given to such charitable use as one Dr. Berryman should appoint; he directed the money to be applied as another Dr. Berryman, his brother, should appoint: which the Court would not allow. Next consider the consequence of this: if the power could not be exercised, will it devolve on the Court? It clearly cannot; for powers devolving on the Court are powers well created in the original, but such as by accident, as the death of persons, cannot be executed by those persons: there is a natural substitution of the Court in the room of those persons. But if a power is void in the original, there is nothing to devolve on the Court. It is the same as if the mother had given it herself indefinitely for the benefit of Francis, his wife and children laying the discretionary power out of the case, as if never inserted in the will; and certainly so far as the wife and children were to have the benefit of it, that would not be good. Nobody could say how much the wife and children were entitled to, because it is given indefinitely. Had it been free from that circumstance of uncertainty, how much each was to take, it would be void as to the wife and children just as that given to Catherine. Suppose she had [644] given it to the husband, his wife and children in gross sums absolutely equally to be divided, that would have been bad and an excess of her power: and if it had been such a partial appointment, so far as void it would have fallen into the residue. The material question then is as to the consequence of this; whether the wife and children being incapable of taking will carry the whole to Francis, or whether any medium can be found out: it is said to carry the whole to Francis; because the execution of a power may be good in part and bad in part; and that even at law an irregular execution of a power will be supported, and not amount to an execution at all; and that in many cases only the excess of a power will be void, the residue good. All that I admit; first that the execution of a power may be good and bad in part; but the consequence of this will be various, as the circumstances

¹ Lord HARDWICKE.

 No. 7. — *Alexander v. Alexander*, 2 Vesey, Sen. 644, 645.

of the cases are. As suppose a power to a man to appoint £1000 among his children; he appoints £100 among the children, and £200 among others who are strangers: the appointment of the £900 will be so absolutely void, as that it will not be prevented from going over, if limited over for want of appointment, as if he had made none; and something of this has happened in this case, or may happen as to Catherine. On the other hand, if the father gives the whole £1000 to his children, and annexes a condition, that they shall release a debt owing to them, or pay money over, the appointment of £1000 would be absolute; and the condition would be only void; and the boundaries between the excess and proper execution are precise and apparent. The ground and principle of all this is, that where there is a complete execution of a power, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void; but where not a complete execution of a power, where the boundaries between the excess and execution are not distinguishable, it will be bad. Suppose one has power to jointure a wife for life, and appoints to her for ninety-nine years, if she so long live, as in the case of Mr. Newport, at law it was held in B. R. to be void, but in equity good *pro tanto*: because he has done less than his power, and it clearly appears how much less; the boundaries are clear and distinguishable; if the wife should outlive the ninety-nine years, the estate as to the residue of her life will be undisposed, and will go over to the remainder or other person entitled. Now to put a case *vice versa*, suppose a power to lease for twenty-one years, and he leases for forty: that shall be good for the twenty-one, because it is a complete execution of the power, and it appears how much he has exceeded it. If the Court can see the boundaries, it will be good for the execution of the power, and void as to the excess. Now

is this appointment for benefit of Francis, his wife and [645] children, a complete execution as to Francis? (for that is contended for.) I think certainly not; for the wife and children were to have something, and so far as something is designed for them it is bad, and no possibility to distinguish how much she has exceeded the power; it falls therefore within neither of those circumstances which are essentially necessary. But it is proper to consider if there is no other way to make this good; because the Court will strongly lean in favour of that side, if it can. I own, I incline to think there is a method: suppose

No. 7. — *Alexander v. Alexander*, 2 Vesey. Sen. 645, 646.

the mother, instead of using the words she has, had given this one-fourth to be applied in such way as most beneficial for her son and his wife and children, if they shall by law be capable; I should not have doubted, but that as the wife and children are not by law capable, it would be absolute to Francis; and the question is, whether there is any difference? This bears an analogy to what the dispositions by the mother would be, if she had given it to a son by name, who never appeared to have existence, or was never capable of taking; if given to these four indefinitely, and three were incapable of taking, the fourth would have the whole, must take such, as the others were incapable of taking. It falls within the reason of the late case of *Humphrey v. Tayleur* (Amb. 136); where a personal estate was given to two in joint-tenancy; one was outlawed; and therefore the testatrix made a codicil, whereby she adeemed what was given to one of the two; the question was, whether the other joint-tenant should take only a moiety? But the Court held, he was to take what the other did not; they were to take the whole between them. The mother never designed this fourth part should fall into the residue; and it would be extremely hard that it should. Then he will be entitled to the whole of that. As to the subsequent restraint, that it should be exempt from debts, she has there exceeded the power given by the law, as in the other case she exceeded the power given by her husband; for it will be left to take the fate of being his property and subject to be come at, as his creditors shall think fit.

I declare therefore, that the execution of the power, so far as it concerns other persons than the children of the testator, is void and of no effect.

NOTE. At the bar was cited the case of *Lord Conway*, who, having power to grant leases of his estate by one instrument, granted several; some of which were not within the power; and though all were within the same instrument, they were considered as several leases, and it was sent to the Master to separate them.

Also the *Dean and Chapter of St. Paul's Case*, to show that where a power exceeded is void at law in the whole, this Court will hold it good as an agreement, and direct a specific performance, restraining the contract according to the power; as was [646] done there.

ENGLISH NOTES.

The judgment of Sir T. CLARKE, M. R., in *Alexander v. Alexander*, has been frequently cited as an authority as to the principle upon which the Court deals with excessive executions of powers; although the particular application of the principle by giving the whole to the one who is capable of taking has been questioned.

In *Crozier v. Crozier* (1843), 3 Dr. & War. 353, lands were conveyed by deed to the use of A. for life, and after his decease unto and to the use of, and to and amongst such one or more of the child or children of A. by his then wife as he should by deed or will limit and appoint, and to the heirs and assignees of such child or children, and for default of appointment to the children as tenants in common in fee. A. by his will, without referring to the power, devised the lands to his wife for life, upon condition that she should thereout maintain and educate his children, in such manner as his executors should think proper; and he directed the residue of income not expended by the wife to be accumulated for the purpose of paying the legacies thereafter bequeathed. He then bequeathed to each of his younger children £500 to be charged (so far as not provided for by the accumulations) upon the lands, and devised the lands to his eldest son for life and after his death to his heirs male and female. The LORD CHANCELLOR (Sir E. B. SUGDEN), after reviewing (with other authorities) the case of *Alexander v. Alexander*, and accepting the principle of that decision, while distinguishing the intention of the wills in the two cases, as to the interdependence of the gifts, declared that the gift to the wife was void, but that the trusts and purposes were valid so far as they were in favour of the children, and void only as to the excess in favour of the wife, and that the gift to the son in remainder in fee (as he construed the gift) was valid. He directed the Master to ascertain when the portions and the maintenance and education were raised, or could have been raised by a due application of the rents and profits, and of the surplus personal estate; and declared that from the period when the portions were or could have been raised, the rents and profits during the wife's life belonged to all the children as tenants in common under the settlement.

In the case of *In re Kerr's Trusts* (1877), 4 Ch. D. 600, 46 L. J. Ch. 287, the MASTER OF THE ROLLS (Sir G. JESSEL), observed that *Alexander v. Alexander* had been overruled so far as it decided that, although there was no possibility of ascertaining what shares the appointees were intended to take, yet the one object of the power took the whole. In the case of *In re Kerr's Trusts*, a testator had given a fund upon trust for such of the "children" of his daughter M. (who was then married) as she should by will appoint, and in default of appointment, for her

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children equally. She appointed to her "Children, E. and C., their executors, &c." E. was an illegitimate child. The MASTER OF THE ROLLS held the intention to be to appoint the fund in moieties, and that E., not being an object of the power, the moiety attempted to be given to E. became, as in default of appointment, divisible between all the children equally.

There is probably still room for a distinction in case of an appointment of real estate to joint tenants, one of whom is incapable of taking. See *Humphrey v. Tayleur* (1752), Ambl. 136, per Lord HARDWICKE, p. 138, Co. Litt. 9 a, 335 a.

In *Lloyd v. Lloyd* (1858), 26 Beav. 96, a testator gave power to his daughter to appoint to her children "with such directions or regulations for maintenance, education, and advancement as their mother should appoint," and in default of appointment gave the fund to the children attaining twenty-one, &c. The daughter by her will appointed the income to her husband (the children's father) until the youngest attained twenty-one, "in or towards the maintenance and education of all her children," and in case of the death of her husband that the income should be paid to her brother for the same purpose. Sir J. ROMILLY, M. R., upon a petition, declared, that the appointment of the income to the husband for the maintenance and education of the children was void, and that such income belonged, as an unappointed fund, under the testator's will, to such of the children as might attain vested interests. And he declared that two children who had attained twenty-one were each entitled to vested interests in one-fifth part of the income, and he ordered payment to them, and the investment and accumulation of the other three-fifths until further order. It does not appear from the report, however, that any reference was made to *Crozier v. Crozier*, or that any claim was made for the application of the income to the education, &c.; and it may be inferred that the education and maintenance of the children was otherwise provided for.

Where an appointment is made to a class, the ascertainment of which depends upon a future event, the appointment is not void *ab initio*, because it may, when the period arrives for ascertainment of the class, include persons not objects of the power. The rule as stated by Vice-Chancellor KINDERSLEY in *Harvey v. Stracey* (1852), Drewry, 73 (at p. 136), is as follows: "If a fund is appointed to objects of the power, that is, if in that respect it is correct, the appointment will be valid, notwithstanding that the persons who are to take as appointees, or the shares and interests which they are to take under the appointment, are made contingent upon a future event, provided the contingency must happen within the period prescribed by the rules relating to perpetuities; and if the fund is appointed not entirely to objects of the power,

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but partly to strangers, it will still be valid *quoad* those who are the objects of the power, and the appointment will fail only as to those persons who are not objects of the power."

The same or a similar principle is applied in *In re Farncombe's Trusts* (1878), 9 Ch. D. 652, 47 L. J. Ch. 328, and in *Duguid v. Fraser*, (1886), 31 Ch. D. 449, 55 L. J. Ch. 285, 54 L. T. 70, 34 W. R. 267.

AMERICAN NOTES.

American cases affirming the doctrine of the rule are *Warner v. Howell*, 3 Washington (U. S. Circ. Ct.), 12; *Barnum v. Barnum*, 26 Maryland, 119, 172-173; *Hillen v. Iselin*, 67 Hun, 444; 144 New York, 365; *Commissioners of Knor County v. Nichols*, 14 Ohio State, 260; *Horwitz v. Norris*, 49 Pennsylvania State, 213.

"The rule as to the excessive execution of a power seems to be that, if the excess can be separated from what is within the legitimate exercise of the power, and if the latter part is not made to depend upon that which is void, or if the objectionable part is distinct from and independent of that which is authorized to be done, the execution, so far as it is conformable to the power, will be sustained, and beyond that will be void." 2 Washburn on Real Property, *327. See also 4 Kent's Commentaries, *346.

In *Horwitz v. Norris*, *supra*, the donee of a power to appoint among his children appointed part of the property to his four daughters for life, and then to their issue in such shares as they should appoint. It was held that, although the power given to the daughters was invalid, their life estates could stand.

In *Hillen v. Iselin*, *supra*, the donee of a power to appoint trust property, undertook, in exercising the power, to appoint new trustees. The Court, citing *Alexander v. Alexander*, held that the "case comes within the principle that the execution of a power will not be defeated because of some provision in excess of the power, which may be eliminated without disturbing the general scheme."

But in *Farrell v. Wendell*, 20 New Hampshire, 431, the Court held that if a power of appointment has, through mistake, been exercised by the donee in favor of some who are, and some who are not, the legitimate objects, it shall not be taken to be good *pro tanto*, in a case in which, in the absence of an appointment, the fund would be distributed among those persons who are the proper objects of the power: but is wholly void. In this case A. had a power to appoint certain property among B.'s relations. She appointed the property among a large number of B.'s kindred, but the Court held that those only were objects of the power who would take under the Statute of Distributions in case of intestacy.

The New York Revised Statutes, Pt. II. ch. 1, t. 2, s. 123, provide that "no disposition, by virtue of a power, shall be void in law or in equity, on the ground that it is more extensive than was authorized by the power; but every estate or interest so created, so far as embraced by the terms of the power, shall be valid."

No. 8. — Carver v. Bowles, 2 Russ. & Myl. 304. — Rule.

No. 8. — CARVER v. BOWLES.

(1831.)

RULE.

WHERE the donee of a power executes an instrument purporting to give the property to objects absolutely, and by a subsequent part of the instrument purports to cut down the gift so as to introduce trusts in favour of persons not objects; the original gift is good, and the subsequent restrictions, so far as in favour of persons not objects, void.

Carver v. Bowles.

2 Russell & Mylne, 304-309 (34 R. R. 102).

Power. — Valid Exercise. — Subsequent Alteration ultra vires, bad.

A testator, having under a settlement a power of appointing by will a [304] sum of £7150 bank stock, in respect of which three bonuses had been paid and invested since the date of the settlement, by his will, after mentioning the original amount of stock, and making an erroneous reference to the first bonus, as then consisting of £715, five per cent stock, appointed the said sum of £7150 bank stock and the said sum of £715, five per cent bank annuities, "together with all such further additions in the nature of profit to be made to the said bank stock in his lifetime : " *Held*, that the appointment extended to all the bonuses.

A testator, having a power under his marriage settlement, to appoint a fund among his children, appointed it to his two sons and three daughters in equal shares, and then declared that the shares appointed to his daughters should be held on the same trusts for the benefit of his daughters and their issue as were therein expressed concerning the shares of his residuary estate bequeathed to each daughter and her issue; under these trusts the daughters took in their respective shares of the residue a life interest to their separate use, but without power of anticipation or alienation :

Held, that the shares of the settled fund were well appointed to the daughters absolutely, but to their separate use during their respective lives, and without power of anticipation or alienation :

That no case of election was raised in favour of the issue of the daughters against the daughters or their husbands.

By an indenture, dated the 16th of January, 1799, which was executed in contemplation of the marriage of the testator H. C. Bowles and Ann Garnault, a sum of £7150 Bank stock, which had belonged to Mr. Bowles, was settled upon the husband and wife, and the survivor of them for life; and after the decease of the

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survivor, upon trust to transfer the Bank stock unto, between, and amongst all and every, the child or children, or such one or more child or children or an only child of the said marriage, at such time or times, in such shares, proportions, manner, and form, and with, under, and subject to such powers, provisos, conditions, restrictions, and limitations over (such limitations over to be for the benefit of some one or more of such children, or his, her, or their issue), as the said H. C. Bowles and Ann Garnault should, in manner therein mentioned jointly appoint; and for want of such joint appointment, as the survivor of them should, after the death of the other, by deed or by his or her will, or any codicil thereto, direct or appoint; and in case of no such direction or appointment by them, or by the survivor of them, and as to so much whereof no such direction or appointment should be made, upon trust for all the children in equal shares, and if but one, then to such only child, and to be paid and transferred at the times therein mentioned.

[* 305] *The marriage took place; there were five children of the marriage, two sons and three daughters; and the wife died in the lifetime of the husband without having joined in any appointment of the bank stock.

In June, 1799, there was paid in respect of the £7150 Bank stock, a bonus of £715, five per cent Bank Annuities, which sum was transferred into the names of the trustees of the settlement; and in the following December, a memorandum, signed by the husband and wife, was indorsed on the settlement, by which it was declared that the £715 five per cent stock was to be subject to the trusts which the indenture declared concerning the Bank stock. In the year 1802, a bonus in money was paid, which Mr. Bowles invested in the purchase of Bank stock in the names of the trustees; and in June, 1816, an addition of 25 per cent was made to the stock by way of bonus. By these means, the Bank stock in the names of the trustees was augmented to £9216.

The will of H. C. Bowles, dated the 18th of April, 1827, after reciting that, by his marriage settlement and the indorsement upon it, £7150 Bank stock, and £715 five per cent Bank Annuities, being in addition made to the Bank stock in the nature of profits, were standing in the names of trustees in trust, after his decease, for all or any one or more of his children, and in such manner, &c., as he should by will appoint, proceeded in the following words: "Now, in pursuance of the said power or authority to me given or reserved

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in and by my said marriage settlement, and by force and virtue thereof, and of every power or authority to me given or reserved, or enabling me in this behalf, I do, by this my last will, &c., direct and appoint, give and bequeath the said sum of £7150 Bank stock, so mentioned in my said marriage settlement, and also the * said sum of £715 five per cent Bank Annuities, together [* 306] with all such further additions in the nature of profit to be made to the Bank stock in my lifetime, unto my five children, Henry Carrington Bowles, Ann Sarah Treacher, Jane Mary Reeves, Francisca Bowles, and John Bowles, equally to be divided among them, share and share alike. But I do hereby will and declare, that one-fifth part or share, so appointed and bequeathed to each of my said three daughters, of and in the said £7150 Bank stock, and £715 five per cent Bank Annuities, is so appointed and bequeathed, and I do hereby, so far as I lawfully or equitably may or can, order and appoint, that the same shall be held and applied by my executors and trustees hereinafter named, upon and for the same trusts, intents, and purposes, for the benefit of each of my said daughters and their issue, as are hereinafter expressed and directed of and concerning the one-fifth part or share hereinafter bequeathed in favour of each such daughter and her issue, of and in my residuary personal estate." These trusts were [(2 Russ. & Myl. 301-302) to pay the interest to the daughter during her life, to her separate use, and, without power of anticipation or alienation; after her decease, for all and every or any one or more of her children in such shares as she should by deed or will appoint: in default of appointment, for all her children equally, who being sons should attain twenty-one, or being daughters should attain twenty-one or marry; in default of such children, for such trusts and purposes, as she should by deed or will appoint: and in default of such appointment, for the person, who, at the time of her decease, would have been her next of kin, if she had died intestate and unmarried.] The will also contained a proviso "that no child, taking a share under any such appointment as aforesaid, shall be entitled to any further or other share of, and in the remaining or unapplied part or parts of the said one-fifth part, unless and until he or she have brought his or her appointed share into hotchpot, and shall have accounted for the same accordingly."

At the date of the will, the £715 five per cents had been converted into a larger amount of 3 per cent stock.

Under these circumstances the following questions were raised:—

[* 307] * I. Whether the appointment extended to the bonuses of 1802 and 1816, or was confined to the original sum of £7150 Bank stock, and the stock into which the £715 five per cent Bank Annuities were converted.

Mr. Tinney and Mr. Teed argued that, by the express words of the will, the appointment was limited to the original amount of stock and the first bonus, and to such additions by way of bonus as might be made after the date of the will; and that there were no words which could be fairly extended to the intermediate bonuses.

The MASTER OF THE ROLLS (SIR JOHN LEACH) was of opinion that the erroneous allusion in the will to the £715 as an existing five per cent. stock, though it had been long converted into a different amount of a different stock, showed that the testator was not acquainted with the particulars of which the accumulated fund consisted, and that his intention was to appoint the whole of that fund which was vested in the trustees of the settlement.

II. As the appointment was bad so far as it attempted to create trusts in favour of the children of the daughters, the grandchildren of the testator not being within the objects of the power, a second question was, whether the shares were well appointed to the daughters absolutely, or whether after the life estates given to the daughters, these shares were to be considered as unappointed.

If the shares were well appointed to the daughters absolutely another question was, whether the restriction against anticipation or alienation and the limitations to the separate use of the daughters during their lives were valid, having regard to the terms of the power contained in the settlement.

[* 308] * The MASTER OF THE ROLLS held that the words of appointment were sufficient to vest the shares absolutely in the daughters; that the attempt to restrict their interest by limitations to their issue, being inoperative, did not cut down the absolute appointment; but that it was competent to the donee of the power to limit the interests, which he appointed to his daughters, to their separate use and to restrain them from anticipation or alienation.

III. It was then contended on behalf of the issue of the daughters, that, as the testator had manifested a plain intention that the children of the daughters should take interests in the settled fund,

No. 8. — *Carver v. Bowles*, 2 Russ. & Myl. 308, 309. — Notes.

and as, by the same instruments, he gave to his daughters shares of his residue, a case of election was raised against the daughters; and the daughters were bound to elect between giving effect to the appointment in favour of their children and the interests which they, the daughters, took under the will. *Whistler v. Webster*, 2 Ves. Jr. 367 (2 R. R. 260).

The MASTER OF THE ROLLS held that, the testator having made an absolute appointment in the first instance, no case of election was raised.

Declare that the original fund of £7150 Bank stock, in the indenture of the 16th of January, 1799, mentioned, and all the additions in the nature of profit which have been made thereto, are well appointed by the will of H. C. Bowles to the defendants, Henry C. Bowles, John Bowles, Ann Sarah Treacher, Jane M. Reeves, and Francisca Treacher, the testator's children, in equal shares, and that, subject to the limitations and restrictions hereinafter

* mentioned, E. T. Treacher, and Ann Sarah his wife, in her [* 309] right, J. Reeves, and Jane Mary his wife, in her right, and H. Treacher, and Francisca his wife, in her right, are absolutely entitled each to one-fifth share of such trust fund and additions, but that the shares appointed to Ann Sarah Treacher, Jane Mary Reeves, and Francisca Bowles are limited to their respective separate use for life, independent of any present or future husband, and are to be held and enjoyed by them without power to make any assignment or appointment by way of alienation. Reg. Lib. 1830, A. fol. 1018.

ENGLISH NOTES.

This decision was followed by Lord ROMILLY, M. R., in *Churchill v. Churchill* (1867), L. R. 5 Eq. 44, where a testator having an exclusive power to appoint to all or any children, appointed the fund to three daughters, and gave his residuary personal estate to the same three daughters, and then directed that the share to which each daughter should become entitled under the will and the appointment should be held in trust for the daughter for life, with the remainder to her children. Lord ROMILLY held that the daughters took absolute interests in the appointed fund, and that no case of election was raised against them in favour of their children.

The same principle was applied by the House of Lords in the Scotch appeal of *McDonald v. McDonald* (1875), L. R. 2 Sc. App. 482. The LORD CHANCELLOR (Lord CAIRNS), after citing *Carver v. Bowles*, as well as (by way of example of cases of gifts and legacies), *Lassence v.*

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Thornycroft Mac. & G. 551), observed as follows (L. R. 2 H. L. Sc. 489): "From all those cases the plain rule is derivable that, if you cannot disconnect that which is imposed by way of condition, or mode of enjoyment, from a gift, the gift itself may be found to be involved in conditions so much beyond the power that it becomes void. But where that is not so, where you have a gift to an object of the power, and where you have nothing alleged to invalidate that gift, but conditions which are attempted to be imposed as to the mode in which that object of the power is to enjoy what is given to him, there the gift may be valid, and take effect without reference to those conditions."

And Lord SELBORNE, after some observations on the construction of the instrument (L. R. 2 H. L. Sc. 492): "So reading the deed, there is first an appointment (in the events which have happened) to the eldest son, as liar (*i. e.* absolute proprietor) of the whole £25,000. All that follows is but a superadded wish, desire, or condition, having in view the settlement or the release to the owners of the entailed estates, of the sum so appointed; which ulterior purpose might be accomplished, and could only be accomplished, through the medium of the estate and interest vested in the eldest son by virtue of this appointment. That wish, desire, or condition, not being authorised by the power, must necessarily fail, unless the appointee (whether bound to elect or not, by reason of other benefits given to him independently of the power) should elect to give effect thereto: but the appointment itself is not, therefore, vitiated. The authorities, of which *Carrer v. Bowles* (2 Russ. & Myl. 301) is an example, have determined (on principles which, if sound in England, must be equally so in Scotland) that an ulterior purpose of this kind, which is *ultra vires* only, and not also a fraud on the power, though it may have operated as a motive to the appointment in the mind of the appointor, will, nevertheless, not prevent an object of the power from taking for his own benefit the estate appointed to him, if the words used, according to their proper construction (which must itself be independent of any peculiar doctrines of law applicable to powers), are sufficient to execute the power and to vest the property in the appointee."

In *In re Crawshay, Crawshay v. Crawshay* (1890), 43 Ch. D. 615, 59 L. J. Ch. 395, 62 L. T. 489, a testator (A.), having a power to appoint £35,000 among his children, made his will appointing £10,000, part of the fund to a daughter B., but directed that the fund should be paid to trustees of another legacy bequeathed to B., and held by them upon the same trusts (being trusts for B. for life with remainders to persons not objects). Then after appointments of the rest of the fund to other children, including a gift of the residue to a child C., he declared that in case he had exceeded his power in not appointing

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the £10,000 to B. unconditionally, and B. or others entitled to object to the settlement thereof should object, he appointed the £10,000 to C. absolutely, who would, he was assured, settle the same voluntarily in the same manner in which he, the testator, had settled the same. After the testator's death B. and C. joined in executing a deed to carry out the testator's wishes as to the £10,000. It was held by NORTH, J., that the appointment to B., so to be held by the trustees for purposes in excess of the power was invalid; but that the gift over to C. was valid notwithstanding the expression of the testator's confidence that he would settle the fund: there being no evidence of a bargain on the part of C. that he would do so.

AMERICAN NOTES.

"If a donee of a power, in undertaking to execute it, annex conditions to the estate he creates which are not authorized by his power, the estate will be absolute, and the conditions void." 2 Washburn on Real Property, *328.

In *Warner v. Howell*, 3 Washington (U. S. Circ. Ct.), 12, Elizabeth Douglass, under the will of her grandfather, Samuel Howell, had a power of appointing a fund by will among the testator's grandchildren. She appointed it in the following terms: "In execution of that power, I will and bequeath to my dear cousin Elizabeth Howell, who is a grandchild of my said grandfather Samuel Howell, the said sum of £4000; and it is done with a dying request and hope, that she will give a part of it to my executor: viz. 4500 dollars, within two months after my decease, or as soon as she can get possession of the money; which sum of 4500 dollars is to be disposed of as follows [among different persons, not grandchildren of Samuel Howell]. But in case my said cousin Elizabeth Howell shall decline to comply with this request, then, and in such case, I will the said £4000 to my cousin Elizabeth Stretch, also a grandchild of the said Samuel Howell, with a like dying request, that she will comply with the above request made to Elizabeth Howell." In holding that the condition was invalid, and the appointment to Elizabeth Howell absolute, WASHINGTON, J., said: "The rule laid down in *Alexander v. Alexander*, as well as in other cases, is, that where there is a complete execution of a power, and something *ex abundanti* added, which is improper, the execution is good, and only the excess void: otherwise, if there is not a complete execution of the power, where the boundaries between the excess and execution are not distinguishable. . . . The condition annexed to the devise to Elizabeth Howell is perfectly distinguishable from the devise of the £4000 to her, which is complete, and consequently the excess only is void."

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No. 9. — DOE D. BLOOMFIELD v. EYRE.

(EX. CH. 1848.)

No. 10. — CROMPE v. BARROW.

(1799.)

RULE.

WHERE the donee of a power after giving a vested estate to an object of the power purports to make a gift over in a certain event to a person not an object of the power, the gift over is effectual to determine the original gift, although it fails to take effect so as to benefit the object intended by the gift over.

And conversely, a conditional gift over to an object of the power following an appointment purporting to be made to a stranger, will take effect according to the event.

Doe d. Bloomfield v. Eyre.

18 L. J. C. P. 284-291 (s. c. 5 C. B. 713).

[284] *Power. — Appointment. — Estate Defeasible. — Coverture, Dispensation of.*

By the marriage settlement of M. S., a copyhold of which she was seised in fee was settled on her husband, J. B., for life, and after his death to the use of M. S. for life, and after her death to the use of such child or children of the marriage, and for such estate or interest, and in such parts and proportions as M. S. by deed might appoint, and for want of such appointment to the use of all the children of the marriage as tenants in common in tail, and in default to M. S. in fee.

M. S., in the lifetime of her husband, and then having two sons, made a will, by which she appointed the estate to her elder son, J. B., and his heirs and assigns forever, on condition that he should pay £200 to W. B., her second son, within a year of her husband's decease, or on W. B.'s attaining the age of twenty-one; but in case neither of the sons should be living at the decease of J. B., her husband, then she gave the estate to her father-in-law, in trust, to sell and pay legacies.

After the date of the will, four other children were born of the marriage. M. S. died in the lifetime of her husband; J. B., the eldest son, died in his father's lifetime leaving the lessor of the plaintiff his youngest son and customary heir; and W. B., the second son, died before his father.

Held, in affirmance of the judgment of the Court of Common Pleas, that

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the lessor of the plaintiff was not entitled to recover. That there was an implied dispensation of coverture in the power given to M. S. That although the appointment was not altogether void, but gave a vested defeasible estate in fee to J. B., the eldest son, and that the appointment over to the father-in-law alone was void: yet that the event which happened defeated and put an end to the estate of J. B., the son.

Ejectment. The declaration contained two demises by Benjamin Goodyear Bloomfield: one alleged to have been made on the 1st of January, 1825, and the other on the 1st of September, 1841.

The defendant defended as landlord in respect of six-sevenths of the property.

At the trial, before COLERIDGE, J., at the Essex Summer Assizes, in 1845, a verdict was found for the plaintiff, subject to the opinion of the Court of Common Pleas on a special case.

The case was argued, in Trinity Term, 1846, and in the next Michaelmas Term, judgment was given in favour of the defendant. The case was afterwards turned into a special verdict, which stated as follows: — That before and at the time of the surrender to uses hereinafter mentioned, Mary Sida was seised in her demesne as of fee, at the will of the lord of the manor of Overhall and Netherhall, in the county of Essex, according to the custom of the said manor, of the tenements with the appurtenances in the declaration mentioned, the same then and still being part and parcel of the same manor, and a customary tenement thereof, demised and demisable by copy of the Court rolls of the said manor, by the lord of the said * manor, or by his [* 285] steward of the Court of the said manor for the time being, to any person or persons willing to take the same in fee simple, or otherwise, to hold of the lord of the said manor, at the will of the lord of the said manor, according to the custom. That by the immemorial custom of the said manor, the youngest son of any person dying seised of any descendible estates in any of the copyhold tenements thereof is the customary heir of his father, and succeeds, as such heir, to the tenements of which his father died seised. That the said Mary Sida being so seised and in possession of the said customary tenements, with the appurtenances, on the 2nd of August, 1764, by the rod duly surrendered out of her hands, into the hands of the lord of the said manor, by the hands and acceptance of William Chaplin, gentleman, in the place of the lord's bailiff, and in the presence of Daniel Sida and John

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Bloomfield the elder, two copyhold or customary tenants in the manor aforesaid, they witnessing the same, according to the custom of the said manor, the said tenements, with the appurtenances, to the intent that the lord of the said manor should thereupon regrant all and every, the said surrendered messuages, lands, tenements, and hereditaments, with their appurtenances, to and for the several uses and purposes hereinafter mentioned and expressed of and concerning the same, that is to say, to the use and behoof of the said Mary Sida, her heirs and assigns, until the marriage intended should be had and solemnised between her, the said Mary Sida, and John Bloomfield the younger; and from and after the solemnisation of the said intended marriage between the said John Bloomfield the younger and Mary Sida, then to the use of the said John Bloomfield for and during his lifetime, and from and after his decease to the use of the said Mary Sida, his intended wife, and her assigns for and during her lifetime, and from and after her decease, to the use of such child or children of the body of the said Mary by the body of the said John Bloomfield, her said intended husband, to be begotten, and for such estate or estates or other interests, and in such parts, shares, and proportions, manner and form, and charged and chargeable with any sum or sums of money for any other of their children as she, the said Mary, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of, and attested by two or more witnesses, or by her last will and testament in writing to be by her signed, sealed, and published as such in the presence of, and attested by three or more witnesses, should or might limit, declare, devise, direct, or appoint; and for want of such limitation, declaration, devise, direction, or appointment, and until such limitation or declaration, devise, direction, or appointment should be made and executed, and the estate or estates, or other interest to be raised and created thereby as aforesaid, should respectively commence and take effect to the use of all and every the children, or of the child, if but one, of the body of the said Mary by the body of the said John Bloomfield, her said intended husband, to be begotten, in equal shares and proportions, if more than one such child, and to take as tenants in common and not as joint tenants, and of the heirs of the several and respective bodies of such children lawfully issuing; and if there should be but one such child to the use of such only child, and the heirs of

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his or her body lawfully issuing; and for want and in default or failure of such children, or of one such child of the body of the said Mary by the body of the said John Bloomfield, to the use and behoof of the said Mary, and of her heirs and assigns forever, and to and for none other use, intent, or purpose whatsoever.

That on the 9th of August, 1764, the said Mary Sida intermarried with the said John Bloomfield, and that the said John Bloomfield and Mary his wife continued from thence during their respective lifetimes, and the said John Bloomfield continued until his death in possession of the said premises with the appurtenances. That on the 30th of May, 1765, the said surrender to uses was duly presented by the homage at a Court of the lord of the said manor, according to the custom thereof; and that, on the 11th of November, 1765, John Bloomfield, the eldest child of the said marriage, begotten of the body of the said Mary by the body of the said John Bloomfield, her husband, and being the father of the lessor of the plaintiff, was born.

That on the 14th of November, 1766, William Bloomfield, the second child of the said marriage, begotten of the body of the * said Mary by the body of the said John Bloomfield, [* 286] her husband, and being the William Bloomfield mentioned in the will hereinafter mentioned, was born. That on the 5th of January, 1767, there being then no other children of the said marriage save as aforesaid, the said Mary Sida, then Mary Bloomfield, made her last will and testament in writing, which was signed, sealed, and published by her as such will and testament, in the presence of, and attested by three creditable witnesses, which will was and is as follows: "I, Mary Bloomfield, wife of John Bloomfield the younger, of Dedham, in the county of Essex, gentleman, according to and in pursuance of the power reserved to me, the said Mary, in and by a certain surrender of the manor of Overhall and Netherhall, in Dedham, dated the 2nd of August, 1764, made and passed by me, the said Mary, by the name of Mary Sida, spinster, upon my then intended marriage with the said John Bloomfield, of all that messuage or tenement called South Field House, and twelve acres of land and pasture, more or less, thereunto belonging, with the appurtenances, in Dedham aforesaid, and held of the said manor by copy of Court roll, and also of all other the lands and tenements of me, the said Mary, then held by copy of Court roll of the same manor, with the appurtenances. Now,

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as concerning the said copyhold premises, with their appurtenances, accordingly, I, the said Mary Bloomfield, do hereby make, publish, and declare this my last will and testament in the manner following, that is to say, I give, devise, direct, and appoint all and singular the aforesaid copyhold messuage, lands, tenements, meadows, pastures, hereditaments, and premises, with the appurtenances, unto my son John Bloomfield, and to his heirs and assigns forever, from and after the decease of my husband John Bloomfield as aforesaid; but nevertheless upon this condition that the said John Bloomfield should pay to my other son William Bloomfield the sum of £200 within one year and a day, after the decease of my husband, John Bloomfield aforesaid, in case that my son William Bloomfield be then living and twenty-one years of age; but if he should then be under the age of twenty-one years, then my will is, that the above sum of £200 shall be paid him by my son John as soon as he comes to the age of twenty-one years. But in case it shall happen that neither of my sons aforesaid should be living at the decease of the said John Bloomfield, my husband, then and in that case happening, I do by this my will, give, devise, direct, and appoint all and every, the aforesaid copyhold messuage, lands, tenements, meadows, pastures, hereditaments, and premises, with their appurtenances, unto my father-in-law, John Bloomfield the elder, of Dedham, in the county of Essex, farmer, his heirs and assigns, in trust, nevertheless, and to the intent and purpose that the said John Bloomfield the elder, his heirs and assigns, as soon as may be after the decease of the said John Bloomfield, my husband, shall absolutely sell and dispose of all and singular the aforesaid copyhold messuage, lands, tenements, meadows, pastures, hereditaments, and premises, with the appurtenances, and surrender or cause the same to be surrendered unto any person or persons and their heirs forever, who shall be willing to purchase the same premises, with their appurtenances, at and for a valuable price or consideration, or purchase-money for the same premises. And I will, order, give, direct, and appoint such purchase-money so to be made and arise upon the absolute sale of the premises as aforesaid, to be applied and paid unto the several persons, and in manner next hereinafter mentioned, that is to say, &c. [The will then stated a number of legacies to different relations.] And as to the residue and remainder of such purchase-money to arise

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and be made upon sale of the said copyhold premises as aforesaid, I give, devise and bequeath, direct and appoint the same unto my said father-in-law, John Bloomfield the elder, and to his use and disposal. And I, the said Mary Bloomfield, do hereby ratify and confirm this to be my last will and testament as concerning the above copyhold premises so by me surrendered as above mentioned, with the intent that the lord of the manor shall regrant the same premises with their appurtenances, as directed and appointed by this my will and testament," &c.

That the surrender in the said will mentioned of the 2nd of August, 1746, and the property therein also first mentioned, were and are the surrender to uses thereinbefore mentioned, and the premises in the declaration mentioned. That on the 15th of * March, 1767, the said John Bloomfield and Mary his [* 287] wife were, at a Court of the lord of the said manor, according to the custom thereof, duly admitted to the said customary tenements with the appurtenances to the said surrender to uses of the 2nd of August, 1764, to hold the same to the uses and in the manner mentioned in the said surrender. That on the 6th of July, 1767, the said William Bloomfield, the said second son of the said marriage, died. That there were afterwards five other children of the said marriage, begotten of the body of the said Mary Bloomfield, by the body of the said John Bloomfield, her said husband, viz., William (the second of that name), Mary, Samuel, Henry, and Sarah, some of whom are still living.

That on the 19th of June, 1782, the said Mary Bloomfield died without revoking or altering her said will.

That on the 27th of December, 1782, administration with the said will annexed was duly granted to the said John Bloomfield, the husband of the said Mary Bloomfield, forth of the proper ecclesiastical Court in that behalf, that is to say, by the Bishop of London. That on the 3rd of February, 1801, the said John Bloomfield the younger, the said eldest son of the said John and Mary, was, at a Court of the lord of the said manor, by an admittance taken according to the custom of the said manor, admitted to the reversion or remainder in fee immediately expectant on the death of the said John Bloomfield, his father, in and to the aforesaid premises, to hold to him the said John Bloomfield the son, his heirs and assigns, immediately from and after the decease of the said John Bloomfield the father, pursuant to the said sur-

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render and will of the said Mary Bloomfield, his mother, deceased. That, on the 26th of June, 1814, the said John Bloomfield the younger intermarried with Elizabeth Goodyear, the mother of the present lessor of the plaintiff, and that, on the 18th of July, 1820, the within-named Benjamin Goodyear Bloomfield, the lessor of the plaintiff, was born, and was the youngest son of the said John Bloomfield the younger. That, on the 20th of July, 1820, the said John Bloomfield the younger, the son of the said Mary, the testatrix aforesaid, and the father of the said lessor of the plaintiff, died intestate in the lifetime of his said father John, the said husband of the said Mary, leaving the said lessor of the plaintiff, Benjamin Goodyear Bloomfield, his youngest son and customary heir, by the immemorial custom of the said manor, him surviving; and that, on the 8th of September, 1820, the said John Bloomfield the said husband of the said Mary, and grandfather of the lessor of the plaintiff, died, having been until his death in possession of the premises. That after the death of John Bloomfield, the husband of the said Mary, and, on the 21st of February, 1821, at a Court baron then held for the said manor, the homage presented the said surrender of the 2nd of August, 1764, and the marriage of the said Mary Sida and John Bloomfield, and that there was issue of the said marriage six children, to wit, the said John, William, Mary, Samuel, Henry, and Sarah, and that the said Mary Bloomfield, formerly Mary Sida, died in the lifetime of her husband, without having made any appointment or disposition by deed or will of the said premises, leaving six children her surviving, and that John and Henry, two of such children, had died in the lifetime of the said John Bloomfield their father.

That on the 1st of November then last, at a Court then holden, the death of John Bloomfield the father, had been presented, and the first proclamation made; and at another Court, held on the 1st of December then last, the second proclamation had been made. That at a Court held the 21st of February, 1821, Benjamin Bloomfield (being the said Benjamin Goodyear Bloomfield, an infant under the age of twenty-one years, to wit, of the age of six months or thereabouts, the youngest son and customary heir-at-law, according to the custom of the said manor, of John Bloomfield the son, deceased, by William Rouse, gentleman, his attorney, was admitted to one-sixth part or share of and in the premises, pursuant to the said surrender of the 2nd of August,

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1764, and as his right and inheritance to hold the said one-sixth part or share of and in the premises unto Benjamin Bloomfield and the heirs of his body, pursuant to the said surrender.

The special verdict then stated the admittance at the same Court of William Bloomfield, of Mary the wife of Henry Fitch, late Mary Bloomfield, of Samuel Bloomfield, of Sarah the wife of W. C. Rouse, * late Sarah Bloomfield, sons and [* 288] daughters respectively of John and Mary Bloomfield; and of Mary Bloomfield, only child and heiress-at-law of Henry Bloomfield, son of John and Mary Bloomfield, each respectively to one-sixth part or share of the premises. That between the months of February, 1821, and March, 1823, Mary Bloomfield, the only child and heiress-at-law of Henry Bloomfield the son, married one Kidd, and afterwards and before March, 1823, died without leaving issue. That at a Court holden for the said manor, on the 18th of March, 1823, the homage presented the admission as above of Mary Kidd, late Mary Bloomfield, spinster, the daughter of Henry Bloomfield, and her death, and that thereupon Samuel Bloomfield, youngest son and heir-at-law of John and Mary Bloomfield, formerly Mary Sida (the said Mary Kidd having died without issue), was admitted to one-sixth part or share in the said premises, to hold to him, Samuel Bloomfield, his heirs and assigns. That in the year 1824, the present defendant purchased the interest of all the parties so admitted as aforesaid in the premises, except the interest of the lessor of the plaintiff, Benjamin Goodyear Bloomfield.

That on the 14th of December, 1824, a deed of covenant was executed, bearing date the day and year last aforesaid, and made between the last-mentioned William Bloomfield, Henry Fitch, and Mary his wife, Samuel Bloomfield, and W. C. Rouse, of Ipswich, and Sarah his wife, of the one part, and the defendant Charles Eyre of the other part, whereby, after amongst other things reciting, that the said intended testamentary appointment of the said Mary Bloomfield was inoperative and ineffectual, inasmuch as it was such a power coupled with an interest as a married woman could not by law exercise, unless there were in the power a dispensation of coverture, for all her children had vested estates tail in the said hereditaments and premises, subject to be defeated by a valid exercise of the said power, and if her appointment of the fee to her son John had been effectual, it must have been carved

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out of her remainder in fee, of which she was seised as of her old estate, and she would thereby have affected her inheritance at a time when by law she was incapable of doing it by such means, and that moreover there was another objection to the validity of the said intended appointment, for the estate was appointed to John in fee, subject to an executory demise to and in favour of persons not the objects of the power, in case neither John nor William should be living at the decease of their father, and neither of whom then was living at the time of the death of their father, and that the appointment to John Bloomfield the elder, in fee, in trust for the legatees, could not take effect, because they were not objects of the power, and the estate intended to be appointed to John the son, or the estate intended to be appointed to John his grandfather, never commenced or took effect, and the children of the said Mary Bloomfield, by her said husband, took the said hereditaments as tenants in common in fee tail, in such and the same manner as if there had been no attempt to exercise the same power of appointment; and further reciting, that the said Charles Eyre, the defendant, had contracted and agreed with the several persons parties thereto, of the first part, for the absolute purchase of the fee simple and inheritance of six one-seventh parts or shares of and in the said hereditaments, and all other, the parts, shares, estates, and interests of the several persons parties thereto, of the first part, of and in the said hereditaments, free from all incumbrance, except the quit rent of 11s. 6d. *per annum*, and the land-tax charged thereon for the sum of £857 2s. 10½d., to be paid as therein mentioned, the parties thereto of the first part respectively covenanted, each of them for himself only, his heirs, executors, and administrators, and for the respective wives only of such of them as were married, his and her heirs, executors, and administrators, that they, the said William Bloomfield, Samuel Bloomfield, Henry Fitch and Mary his wife, and W. C. Rouse and Sarah his wife, or their respective heirs, would severally within ten days then next, at the costs of each of them respectively, suffer a good and effectual common customary recovery or recoveries of the said hereditaments, with the appurtenances, and would immediately after such recovery should be suffered at the request and costs of the said Charles

Eyre, his heirs and assigns, at or before the next Court for [* 289] the manor of Overhall and Netherhall, in Dedham *aforesaid, surrender into the hands of the lord of the said

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manor, or otherwise effectually convey and assure according to the custom of the said manor, to the use of the said Charles Eyre, his heirs and assigns, six seventh parts or shares, and all the estates and interests of the said parties thereto of the first part, of and in the said copyhold hereditaments; and the said indenture also contained covenants by the said vendors for title and quiet enjoyment against, and notwithstanding any act, wilful omission of the vendors, or of the said Mary Bloomfield, deceased, or any persons claiming through or under them or her. That afterwards, on the 14th of December, 1824, a surrender was made, and recovery suffered in pursuance of the deed of covenant, and that the defendant was thereupon admitted to the said premises, except the share of the said Benjamin Goodyear Bloomfield, accordingly, to hold to him, his heirs and assigns forever, according to the custom of the said manor, and entered into possession thereof, and continued in the possession or enjoyment of the same until the present ejectment was brought in the beginning of the year 1845. That there was a custom in the manor to appoint guardians; that W. C. Rouse was appointed guardian of the lessor of the plaintiff; and that in 1825, a lease was also granted by W. C. Rouse, who purported to act as the guardian of the lessor of the plaintiff to the defendant, of the one-seventh share of the lessor of the plaintiff in the premises, which lease had expired before the ejectment was brought.

The special verdict then stated a lease by Benjamin Goodyear Bloomfield, the entry of the nominal plaintiff, and his ouster by the defendant. And the jurors, &c., said, that the defendant was not and is not guilty of the said trespasses and ejectments within specified, as to the one-seventh undivided part of the several hereditaments within specified. But whether or not, upon the whole matter aforesaid, by the jurors aforesaid in form aforesaid found, the defendant be guilty of the trespasses and ejectments within specified, as to the said remaining six seventh undivided parts of the said hereditaments, the jurors aforesaid were wholly ignorant, &c. And if upon the whole matter aforesaid, it shall seem to the Court that the defendant is guilty of the trespasses and ejectments as last aforesaid, then the jurors, &c., say, that the defendant is guilty thereof in manner and form as the plaintiff has within complained against him, and in that case they assess the damages at, &c. But if upon the whole matter aforesaid it shall

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seem to the Court that the defendant is not guilty of the said trespasses and ejectments as to the said six seventh undivided parts of the said hereditaments, then the jurors, &c., say, that the defendant is not guilty thereof, in manner and form as the plaintiff has within complained against him. And because, &c.

Judgment having been entered for the defendant upon the special verdict in the Court of Common Pleas, the lessor of the plaintiff brought a writ of error.

The case was argued, in the Exchequer Chamber (June 17, 1847). by —

Hodgson (with whom was Willes), for the plaintiff in error; and by —

Bovill (with whom was Talfourd, Serj., for the defendant in error.

The material portions of the argument are fully adverted to in the judgment of the Court. *Cur. adv. vult.*

PARKE, B., now (February 1, 1848) delivered the judgment of the Court (PARKE, B., ALDERSON, B., COLERIDGE, J., ROLFE, B., WIGHTMAN, J., ERLE, J., and PLATT, B.):—

This case comes before us on a writ of error on a judgment of the Court of Common Pleas on a special verdict. The facts of the case are fully stated in the special verdict. It is unnecessary to advert to them in detail. A very short statement is sufficient to explain the questions which we have to decide.

On the marriage settlement of Mary Sida, a copyhold estate of which she was seised in fee was settled to the use of her husband for life, and after his death to the use of Mary Sida for life, and from and after her decease to the use of such child or children of the body of Mary Sida by her intended husband, and for such estates or other interests, and in such parts, shares, or [* 290] * proportions as Mary Sida, by any deed or writing sealed in the presence of and attested by two witnesses, or her last will duly executed, might direct and appoint; and for want of such appointment, to the use of all the children of the marriage as tenants in common in tail, and in default to Mary Sida in fee. Mary Sida, in the lifetime of her husband, and then having two sons, made a will, duly executed according to the power, and appointed the estate to her eldest son, John Bloomfield, and his heirs and assigns forever, upon condition that he should pay to

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her other son £200 within a year and a day after her husband's death, in case he should be living and twenty-one years of age, &c.; but if neither of her sons should be living at the decease of her husband, she appointed the estate to her father-in-law, his heirs and assigns, upon certain trusts.

The testatrix died in 1782. John Bloomfield, the devisee, died in 1820, in his father's lifetime, leaving the lessor of the plaintiff, his youngest son and customary heir, and the father died afterwards in 1820. William Bloomfield, the second son, had previously died in 1767.

This action was brought by the lessor of the plaintiff in 1841. The defendant defended for six sevenths of the property; and the question is, whether the lessor of the plaintiff is entitled to recover. The Court of Common Pleas decided that he was not, and we are of opinion that the decision was correct. Two objections were made to the title of the lessor of the plaintiff to recover. The first was, that there was no dispensation of coverture in the power given to Mary Sida, and that her execution of the power during coverture was therefore void. The second was, that John Bloomfield the son had no estate which descended to the lessor of the plaintiff. We intimated our opinion in the course of the argument, that it was clear that there was in this case an implied dispensation of coverture, and that there could be no doubt that the meaning of the settlement was that the power should be executed by Mary Sida, whether sole or covert. The second was the principal question. It was contended on behalf of the defendant in error, that the appointment to the son was altogether void, by being so connected with the appointment to the father-in-law that it could not be separated. If this were so, the lessor of the plaintiff could not be entitled to recover; but the learned counsel for the plaintiff in error argued that the appointment was not altogether void, but gave a vested defeasible estate in fee to the eldest son, and that the appointment over alone was void. Admitting that argument to be correct, as we think it was, we are of opinion, that in the event which has happened, that state was put an end to; and, consequently, the lessor of the plaintiff is not entitled to recover. The learned counsel contended, that where there is an estate in fee, liable to be defeated on a condition subsequent, and that condition either originally was or by matter subsequent became impossible to be performed, the defeasible estate

was made absolute; and he cited the authority of Co. Litt. 206 a. Of this there is no doubt; and the principle is applicable to this case, if the condition was impossible. But the question is, what was the condition by which the testator meant the estate to be defeated? Was it that the estate should be defeated if the two sons died in the father's lifetime, or if they so died, and the estate should by law vest in the father-in-law? In the former case, the lessor of the plaintiff would fail; in the latter, he would succeed. This question is not peculiar to cases of appointments under powers; the same question precisely might arise on any ordinary will. If a testator, seised in fee, were to devise a real estate to A. B. in fee, and to direct, that in the event of A. B. dying in the lifetime of J. S., the estate should go over to a charity, it surely is perfectly clear that if A. B. should die in the lifetime of J. S. he, or rather his heirs, would lose the estate. The testator could not give to the charity without taking away from the devise. The testator, therefore, in such a case, by his will, says, "If A. B. dies in the lifetime of J. S., I do not mean that he or his heirs should any longer have the estate." The estate of A. B. is in such case defeated, not by the giving over the estate to the charity, but by the happening of the event on which the testator intended it should go over. So in the case before us, the testatrix (for this purpose she may be treated as an ordinary testatrix)

[* 291] says, in substance, "If my son * John and his brother

William die in their father's lifetime, I do not mean him (John) to have the property, but I give it over to strangers." That which defeats the estate of John is, the death of himself and his brother in his father's lifetime, not the giving over the estate to strangers. The reason why John's representatives cannot claim the property is, that his mother expressly declared, that in the event which happened, he should not have it. How she would have disposed of it, if she had known that she could not give it in the mode proposed by her will, can only be matter of conjecture. One thing quite certain is, that she has not expressed any intention, in the event which happened, that John should take, and as he could only be entitled by virtue of an expressed intention in his favour, we think he fails to establish any right, and that the judgment of the Court below must be affirmed.

Judgment affirmed.

No. 10. — *Crompe v. Barrow*, 4 Ves. 681, 682.

Crompe v. Barrow.

4 Ves. 681-686 (4 R. R. 318.)

Power. — Excess in Appointment. — Good Limitation over.

An appointment exceeding the power by a limitation to objects not [681] within the power is void as to the excess; as where the power is to appoint to children, and the appointment is to a child for life, and after his decease to his wife and children; but that void limitation shall not defeat a limitation over to an object of the power, in case such child dies without leaving a wife or child surviving.

By settlement, dated the 17th of April, 1796, made previously to the marriage of John James and Mary Barrow, widow, a leasehold house in Tottenham Court Road, of which Mary Barrow was possessed for a long term of years, and a bond to her, for securing £2000 and interest, were assigned to trustees, upon trust, after the marriage, subject to a bond debt of £150 due by Mary Barrow, to receive the rents and interest, and to pay the same or permit the same to be received by Mary Barrow for her life for her separate use and benefit; and after her decease, then upon trust, that the trustees should stand possessed of the said messuage or tenement and of the said bond thereby assigned, and the money due thereon, for all and every the child and children of the said Mary Barrow by John Barrow, her then late husband, or by John James her said intended husband, to be begotten, in such shares and proportions, and to be paid at such ages and times, and in such manner, as she, the said Mary Barrow, should by her last will and testament in writing, or by any writing purporting to be or in the nature of her last will and testament (notwithstanding the said then intended coverture) to be by her signed, sealed, and executed,

* in the presence of two or more credible witnesses, give, [* 682] order, direct, limit, or appoint; and that for such estate or estates, rights, and interests, as she, the said Mary Barrow, should think proper concerning the same respectively; and in case the said Mary Barrow should die without making any such gift, order, direction, limitation, or appointment, in manner aforesaid, or in case the whole of the said messuages or tenements and premises, or the money intended to be secured on the said bond, should not be fully and absolutely disposed of, then in trust to

No. 10. — *Crompte v. Barrow*, 4 Ves. 682, 683.

assign the said messuage or tenement, and to divide the moneys to be received from the said bond or so much thereof respectively as should not be so disposed of by the said Mary Barrow, as aforesaid, unto and amongst all and every the child and children of the said Mary Barrow by the said John Barrow deceased, and to and amongst all and every the child and children of the said Mary Barrow to be begotten by the said John James, her intended husband, in equal shares, to be divided between them share and share alike, and to be assigned to such of the said children, as were or should be a son or sons at twenty-one, and to such as should be a daughter or daughters at twenty-one or marriage, which should first happen; and in case any of them being sons should be then infants, or being daughters should be under age and unmarried, at the death of the said Mary Barrow, then in trust to assign their respective shares thereof when they respectively attain the age of twenty-one years or day of marriage; and in case there should be only one such child, then in trust to assign the said messuage or tenement and the money to arise by the bond, unto such only child at the day and time and in manner aforesaid; and in case the said Mary Barrow should die without any such child or children as aforesaid, living at the time of her death, then in trust for the executors or administrators of her, the said Mary Barrow.

The marriage took place.

Mary James by her will, dated the 11th of February, 1796, executed in the presence of three witnesses, reciting the settlement, so far as related to the said leasehold messuage and bond, and her power of appointment, and that part of the said £2000 secured by the bond had been received by her, and laid out in £1000 Three Per Cent Consolidated Bank Annuities, which were transferred to the

trustees upon the trusts declared by the settlement concerning * the bond, did thereby order, direct, limit, declare,

and appoint, that the trustees or the survivor, his executors, &c., should immediately after her decease stand possessed of the said messuage and premises in Tottenham Court Road and of the said £1000 Bank Annuities and the rents, interest, and dividends, thereof respectively, and of all money then due or owing upon, or which might thereafter be received by virtue of the said bond, in trust as to one moiety thereof for her daughter Frances James, wife of Robert Jeremiah Edward James, her executors, administrators, and assigns: but she ordered and directed, that the rents

No. 10. — *Crompte v. Barrow*, 4 Ves. 683, 684.

and profits of her said moiety of the said messuage and premises in Tottenham Court Road aforesaid should be received by the trustees or the survivor, &c., during the natural life of her said daughter, and paid to her for her own separate use; and as concerning the other moiety of the said trust estate and premises and the rents, interest, and dividends thereof, in trust to permit and suffer the same to be received by her son Charles Barrow for his life; but so as that the same may not be subject to any debts or incumbrances he then had, or might hereafter contract; and after his decease upon trust for such wife and children or child of the said Charles Barrow as he might leave behind him, in such shares as he should by any deed or writing with or without power of revocation, to be by him signed, sealed, and delivered, in the presence of two or more credible witnesses, or by his will in writing, to be by him signed and executed in the presence of two or more credible witnesses, give, order, direct, limit, or appoint the same; and for want of such gift, &c., and as to such part of the said premises, whereof no such gift, order, &c., should be made, in trust to assign, transfer, and pay the same unto such wife and children or child, equally, if more than one; and if but one of them should be then living, then to assign the whole to such only one, her or his executors, &c., for all the residue of the term, estate, and interest, which should be then to come therein: but in case the said Charles Barrow should die without leaving a wife or child him surviving, then, after his decease, in trust to assign the same unto her said daughter Frances James, her executors and administrators.

The testatrix died upon the 18th of June, 1798. At her second marriage she had six children living by her first husband: but * only two of them, viz. Charles Barrow and Frances [* 684] James, were living when she made her will; and she had no children by her second marriage.

The bill was filed by the trustees to have the rights of the defendants Charles Barrow and James and his wife under the power of appointment and the will ascertained.

The defendant Barrow, by his answer admitted, that the power was exceeded by limiting to him for life, and afterwards to his wife and children, &c., and, for want of such wife or children, to the defendant Frances James, and that such limitations are void; and he stated, that he is entitled to a moiety of the trust estate: and that if the defendants James and his wife are entitled to any share

in the said moiety, yet they are willing to relinquish their right in his favour.

The defendants James and his wife by their answer insisted, that the limitation of one moiety after the death of Charles Barrow to his wife and children or child is a void appointment; and that upon his death the defendant Frances James, her executors and administrators, will be entitled to the said moiety; and that such moiety so limited to Barrow for his life with such remainders over is to be considered as unappointed: but they consented to relinquish their right in the said moiety in favour of the defendant Barrow.

This cause stood a short time for judgment.

MASTER OF THE ROLLS (SIR R. P. ARDEN):—

The question is, whether there is a good execution of the power by this will. It is clearly good as to the interest for life given to the son; but then as to the gift over after his decease to his wife and children, who are not objects within the meaning of the power, they are strangers as much as any others with respect to this marriage settlement. *The Duke of Devonshire v. Lord George Cavendish* (in the King's Bench, Hil. 22 Geo. III. stated in *Robinson v. Hardeastle*, 2 T. R. 245 (1 R. R. 470)) is the only authority in favour of extending the power to grandchildren: though it is not a decision upon the point: and it was also considered as a case

of election. But, except that case, all the cases, *Pitt v. [* 685] Jackson*, 2 Bro. C. C. 51, * *Routledge v. Dorvil*, 2 Ves. 357

(2 R. R. 250), where I decided the point upon very full consideration, and *Robinson v. Hardeastle*, 2 T. R. 245 (1 R. R. 467) determine, that where a power is given to distribute among particular objects, the power must be exhausted among those objects; and no other person, however nearly related to those objects, can be joined with them as such; and the children of the objects are no more objects than any other persons. Therefore, as to so much of this property as is not distributed among the objects of the power, it is to be considered as unappointed.

Declare, that, as to one moiety of the trust premises, the same is well appointed to Frances James, her executors, administrators, and assigns; and as to a moiety of the said messuage in Tottenham Court Road, to her sole and separate use; and as to the other moiety of the said trust premises, declare, that the same is well appointed for the benefit of the defendant Charles Barrow for his

life according to the trusts of the said will and appointment; and that the appointment of the said moiety of the said trust premises after his death in trust for his wife and children is invalid; the same not being well appointed by the terms of the power in the said marriage settlement; and declare, that in case Charles Barrow shall die without leaving a wife or child surviving, the same according to the said appointment will belong to the defendant Frances James, her executors and administrators.

It was then suggested, that the ultimate limitation to Frances James depended upon the preceding estates given to the wife and children of Charles Barrow, and must fall with them, as the will must receive its general construction from the death of the testatrix.

MASTER OF THE ROLLS:—

I do construe the will at the death of testatrix; and I think, the ultimate appointment is good. If there is no wife or child of Charles Barrow, the manner, in which she has affected to execute the power, never takes effect at all. I have determined in *Routledge v. Dorril* according to *Robinson v. * Hardecastle*, [* 686] that if you give for life to a child, who is an object of the power, and then to the children of that child, and, in failure of issue, to a person who is an object of the power, that is void: but the distinction of this case from that is, that this limitation over to Frances James is, if Charles Barrow should die without leaving a wife or child surviving. It fails, as far as it affects to give interests to the children; but is there any occasion to make it fail upon the other point, the gift over to a person who is an object of the power? Why am I to exclude the person taking over, who has a right to take? There are two alternatives: if Charles Barrow leaves no wife or children at his death, then the limitation over being to a good object shall take effect; if he does leave a wife or children, then it cannot take effect.

ENGLISH NOTES.

Doe d. Bloomfield v. Eyre was followed by Vice Chancellor KINDERSLEY in *Robinson v. Wood* (1858), 27 L. J. Ch. 726. A testator had devised his real estate to trustees, their heirs and assigns, upon trust to apply the rents for the maintenance of his daughter till twenty-one, and then to convey the estates to his daughter, her heirs

Nos. 9, 10. — *Doe d. Bloomfield v. Eyre*; *Crompe v. Barrow*. — Notes.

and assigns; and in case his daughter should die under twenty-one leaving issue, then upon trust for the absolute use and benefit of such issue as tenants in common; but if she should die under twenty-one without issue, then upon trust to sell the property and pay the proceeds to a charity. The daughter died under twenty-one, without issue, and — the gift over being void under the Statute of Mortmain, — Vice-Chancellor KINDERSLEY held that the original devise to the testator's daughter, assuming that she took an absolute vested estate in fee simple, was divested by the subsequent gift over, although that gift had failed; and that the trustees of the will became entitled to the estate.

But if the conditional gift over is void for remoteness, the original gift will take effect as an absolute gift. *In re Brown and Sibley's Contract* (1876), 3 Ch. D. 156.

Where there is an attempted delegation of a power to non-objects, and there is no attempt to exercise the power so attempted to be delegated, it seems that a subsequent limitation may take effect as an independent and valued gift.

In *Webb v. Sadler* (1873), L. R. 8 Ch. 419, 42 L. J. Ch. 498, 28 L. T. 388, 21 W. R. 394, a husband and wife, having under their marriage settlement a joint power of appointment over personalty in favour of children of the marriage, appointed one-third of the fund to trustees upon such trusts as H. (one of the sons) by deed executed with the consent of the father during his life, and after his death with consent of the trustees of the will, or by will, should appoint; and in default of appointment upon trust for H. for life, or until bankruptcy or assignment (limited to twenty-one years after the death of the surviving parent); and after H.'s death, upon trust for his executors or administrators as part of his personal estate. It was held by the Appellate Court that the appointment to such uses as H. should appoint with consent of the trustees was void; but that the limitation over in default of appointment by H., which (along with the previous gift) they construed as giving H. an absolute interest, subject to the contingent forfeiture of the life interest in case of bankruptcy, &c., took effect. Lord SELBORNE, L. C., said (L. R. 8 Ch. 426): "The first point in this case is one of construction. There is no bias in the mind of the Court upon the question of construction. The sole object is to find out the meaning of the words which are used, and when that is done the legal effect has to be ascertained. Here, it appears to us quite clear that no power of appointment whatever is given to H. by the first clause of the first deed-poll, and the corresponding clause in the other instrument, excepting the power to be exercised, with the consent in writing, after the death of the parents, of the acting trustees or trustee, who were persons to whom no such authority could be delegated,

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independently of any question of remoteness. If therefore, that is an inseparable condition of the exercise of the power, the power altogether fails. We all think it is an inseparable condition of the exercise of the power. There is no analogy between the effect of such a clause and the cases where there is a separate and superadded condition after the gift of an estate. Here there is no power except with consent. Then the next question is, whether the subsequent appointments, 'in default of and subject to any such limitation or appointment' containing dispositions in favour of the son, are so connected with the void power, that the void power failing they fail also. It seems to me that such a construction would be expressly contrary to the declared intention. The declared intention is, that unless estates that would displace this gift to the son are created in favour of other persons by means of the power, then the son is to take under this part of the instrument; and if the power is void, then no such estate could be created, and the event never could arise which alone was meant to prevent the gift in favour of the son taking effect."

So in *Williamson v. Farwell* (1887), 35 Ch. D. 128, 56 L. J. Ch. 645, 56 L. T. 824, 36 W. R. 37, where the donee of a power of appointment among his own children appointed to his son for life, with remainder to the son's children as he should appoint, and, in default of appointment, to the son absolutely; and the son died without having attempted to exercise the power delegated to him: it was held by NORTH, J., that the ultimate limitation in favour of the son was valid and took effect.

On a similar principle it has been decided by STIRLING, J., that where a power contained in an instrument is void for remoteness by reason of the uncertainty of its being exerciseable within the prescribed period, a gift or limitation over in default of appointment under the power is not necessarily invalid unless such gift or limitation is itself obnoxious to the rule. *In re Abbott, Peacock v. Frigout*, 1893, 1 Ch. 54, 62 L. J. Ch. 46, 67 L. T. 794, 41 W. R. 154. The learned Judge observed that such a case was not governed by the cases which decide that a limitation depending or expectant on a prior limitation which is void for remoteness is invalid. — the reason for those decisions being that the persons entitled under the subsequent limitation are not intended to take, unless and until the prior limitation is exhausted. See *Robinson v. Harcastle* (1788), 2 T. R. 241, 251, 1 R. R. 467, per BULLER, J. (1 R. R. 472); *Routledge v. Dorril* (1794), 2 Ves. Jr. 357, 2 R. R. 250; *Beard v. Westcott* (1822), 5 B. & Ald. 801, 24 R. R. 553; *Mongpenny v. Dering* (1852), 2 De G. M. & G. 145, 181, 182, 22 L. J. Ch. 313, 319.

No. 11. — *Brudenell v. Elwes*, 1 East, 442. — Rule.

No. 11. — BRUDENELL *v.* ELWES.

(1801, 1802.)

RULE.

THE failure of an appointment by reason of the object not being within the power, does not accelerate a subsequent estate purporting to be given by the instrument executing the power.

So where an appointment is made by deed purporting to give a life estate to an object of the power, with remainder in tail to a person not an object, a subsequent remainder, although expressed to be given to an object, will fail; and the property, subject to the life estate, will go as in default of appointment.

Brudenell and Brooks v. Elwes and others.

1 East, 442-455; 7 Ves. 382-391 (6 R. R. 310).

Power. — Appointment to Non-object. — Accrues to Donees in Default of Appointments.

[412] A power of appointment under a marriage settlement unto and among all or any the child or children of the marriage for such estates as the husband and wife, or the survivor of them, should from time to time, either with or without power of revocation, direct, limit, or appoint, may be executed by the survivor, after a joint appointment reserving to them and the survivor a power of revocation and appointment. But under such power, if the second appointment be to the daughter of the marriage for life, remainder to the eldest son for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons in tail, &c., remainder to the daughter in fee, all the limitations subsequent to that to the eldest son for life are void, as being an excess beyond the power; and the ultimate remainder dependent upon such intermediate limitations, though made in favour of one of the objects of the power, is also void; and shall not be accelerated by the event of such void intermediate limitations not having taken effect, for want of issue male of the eldest son, &c., to whom the appointment was made. For an appointment not good in its creation will not become so by subsequent circumstances. And such an appointment, being by deed, cannot be construed *cy pres*, so as to give the sons estates tail, as perhaps might have been the case if the appointment had been by will.

By articles of agreement, dated the 16th of December, 1730, made previous to and in contemplation of the marriage of Jerning-

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ham Cheveley with Louisa Mary Jamineau, John Cheveley [443] the father and Jerningham Cheveley covenanted with John and Isaac Jamineau (trustees therein named) and their heirs, &c., that they would, within six months after the marriage, convey and assure the manor of Garlands and certain other lands in Essex therein mentioned, to the use of Jerningham Cheveley for life, remainder to Louisa Mary for life, remainder to the trustees and their heirs, upon trust to convey and assure all or any part thereof unto and among all or any the child or children of the body of Jerningham Cheveley on the body of Louisa Mary to be begotten, in such parts and proportions, and for such estate and estates, and with and under such charges, provisos, conditions, and limitations as Jerningham Cheveley and Louisa Mary, or the survivor of them, should from time to time by any deed or writing, either with or without power of revocation, to be by him, her, or them duly signed and sealed in the presence of three or more credible witnesses, or by his or her last will in writing testified in manner aforesaid, direct, limit, or appoint: And in default of such appointment, to the use of the first and other sons of the body of Jerningham Cheveley on the body of Louisa Mary Jamineau in tail male successively; remainder to trustees upon divers trusts (which are since become incapable of taking effect); remainder to the right heirs of Jerningham Cheveley forever.

The marriage took effect: and by indentures of lease and release of the 20th and 21st of September, 1768, made between Jerningham Cheveley and Louisa Mary his wife of the one part, and Isaac Jamineau (the surviving trustee) on the other part, reciting the said articles, and that there was issue of the marriage then living, two sons, namely, Jamineau and Jerningham Cheveley, and a daughter Jane Cheveley, all of whom had respectively [444] attained the age of twenty-one years; Jerningham Cheveley the elder (his father John Cheveley being dead) granted and conveyed unto Isaac Jamineau and his heirs the manor of Garlands, and other lands mentioned in the articles, to the use of him the said J. C. the elder for life; remainder to the use of L. M. his wife for life, by way of jointure; remainder to the use of all or any the child or children of the body of J. C. the elder on the body of Louisa his wife lawfully begotten and to be begotten, in such parts or proportions, and for such estate and estates, and with and under such charges, provisions, conditions, and limitations, as J. C. the

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elder and L. M. his wife, or the survivor of them, should from time to time by any deed or writing, either with or without a power of revocation, to be by him, her, or them duly signed and sealed in the presence of three or more credible witnesses, or by his or her last will in writing testified in manner aforesaid, direct, limit, or appoint. And in default of such appointment, then (in strict settlement) to the use of the first and other sons of the marriage successively in tail male; and in default of such issue, to the use of the settlor's right heirs.

By indenture dated the 22nd of September, 1768, duly executed by Jerningham Cheveley the elder and Louisa Mary his wife of the one part, and Jerningham Cheveley the younger and Jane Cheveley of the other part, reciting the said articles and indentures of lease and release, and that J. C. the elder and L. M. his wife were desirous of making some provision for Jane Cheveley their daughter, and also for Jerningham Cheveley the younger, they, the said Jerningham Cheveley and Louisa Mary his wife, by virtue of the power and authority reserved to them by the [445] articles of agreement and indentures, directed, limited, and appointed unto and to the use of Jane Cheveley, her heirs and assigns forever, the reversion in fee expectant upon and to take effect in possession after the decease of Jerningham Cheveley the elder and Louisa Mary his wife, of and in the manor of Garlands, &c., upon trust, by demise or mortgage, &c., to raise £1000 for the benefit of Jerningham Cheveley the younger. In which deed there was a proviso, that it should be lawful for Jerningham Cheveley the elder and Louisa Mary his wife, and the survivor of them, from time to time, or at any time or times during the lives of them or the survivor of them, by any deed or instrument in writing, with or without power of revocation, sealed and delivered by them or the survivor of them, and in the presence of and attested by two or more credible witnesses (but subject and without prejudice to the raising of the said £1000), to revoke, alter, annul, or make void the said limitation or appointment thereby made to or in favour of the said Jane Cheveley, her heirs and assigns as aforesaid; and by the same deed or instrument in writing, or by any other such like deed or instrument in writing, to be by them the said J. C. the elder and L. M. his wife, or the survivor of them, sealed and delivered in the presence of and attested by the like number of witnesses, to direct, limit, and appoint all or any of the heredita-

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ments and premises so thereby directed, limited, and appointed, unto or amongst all or any of the child or children of the body of J. C. the elder, on the body of L. M. his wife begotten, in such parts and proportions, and for such estate and estates, and with and under such charges, provisos, and limitations over (but such limitations over to be for the benefit of some or one of the children), as they, the said J. C. the elder and L. M. his wife, or the survivor of them, should *from time to time direct, limit, or [*446] appoint.

The said £1000, provided for Jerningham Cheveley the younger by the last mentioned indenture, was soon afterwards raised by Jane Cheveley by a mortgage of her reversion of the manor, &c.; and before any other deed of revocation or appointment had been executed Jerningham Cheveley the elder died, in the lifetime of his wife, and without having had any other children.

After his death, by indenture tripartite of the 29th of March, 1773, properly executed by Louisa Mary Cheveley, his widow, of the first part, and Jamineau Cheveley, Jerningham Cheveley, and Jane Cheveley, her said three children of the second part, and certain trustees of the third part; reciting the several instruments before mentioned, and that Jerningham Cheveley the elder was since dead intestate, and without having made any further or other direction, limitation, or appointment with Louisa Mary his wife, &c., she, the said Louisa Mary Cheveley, by virtue of the power reserved to her by the indenture of the 22nd of September, 1768, and in execution of the same, did revoke and make void the direction, limitation, and appointment in and by the said indenture made by her and her deceased husband in favour of Jane Cheveley, her heirs and assigns (but without prejudice to the payment and security of the said £1000 in favour of Jerningham Cheveley): and it was thereby further witnessed, that in order to the making a new and other direction, limitation, and appointment of and concerning the reversion in fee, as well of the manor of Garlands and lands before mentioned (subject as without prejudice as aforesaid), as also of certain other estates therein mentioned, the said Louisa Mary Cheveley, by virtue of the power and authority to her as such survivor reserved by the indenture of the 22nd Sep- [417] tember, 1768, and in execution thereof, did, after appointing the reversion in fee expectant upon her death of and in other parts of the premises in the said articles and indentures mentioned to

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her sons Jamineau and Jerningham, and her daughter Jane Cheveley, and their issue, in manner therein mentioned, direct, limit, and appoint the reversion in fee expectant upon her decease, in the manor of Garlands, &c., to the use of Jane Cheveley and her assigns for life, sans waste: with a proviso that it should be lawful for Jane Cheveley, when she should be in the actual possession of the premises for life, by demise, lease, or mortgage of the premises for any term of years, to raise thereout £1000 to be payable after her decease to such person or persons, and in such manner and form, as she by deed or will should direct or appoint; and subject to such direction or appointment (if any such there should be), from and after her decease, to the use of Jamineau Cheveley for life, sans waste; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male successively; remainder to Jerningham Cheveley the younger for life, sans waste; remainder to trustees, &c., remainder to his first and other sons in tail male successively; remainder to the use of Jane Cheveley in fee. And by the said indenture there is a full power of revocation and new appointment reserved to Louisa Mary Cheveley.

But before any such further deed was executed, viz., on the 17th of March, 1776, she died; leaving her three children all surviving.

Jamineau and Jerningham Cheveley the younger are both since dead, without having had any issue male; and Jane Cheveley is also dead: and Jamineau Cheveley survived his [*448] brother *and sister: and the aforesaid Jane Cheveley

before her death made her will, duly executed and attested to pass real estates: whereby after reciting that she was entitled for her life, and also to the reversion or remainder in fee to the manor of Garlands, &c., she gave and devised her aforesaid reversion in fee, and all and singular her estate and interest whatsoever in the said manor and hereditaments, unto and to the use of the plaintiffs G. B. Brudenell, G. Brooks, and Elizabeth Morley (which last is since dead), and their heirs, upon certain trusts in her will mentioned: and she died without revoking or altering her said will. Soon after her death the plaintiffs, the surviving devisees in trust under her will, contracted with the defendant Elwes for the sale of the manor and premises; but he afterwards objecting to the title of the trustees, they instituted a suit in Chancery against him and others, for the purpose of compelling him to com-

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plete his purchase ; which coming on to be heard before the LORD CHANCELLOR on the 6th of August, 1800, his Lordship directed the above case to be made for the opinion of this Court upon the following questions : viz., Whether the deed of appointment of the 22nd of September, 1768, which was executed by Jerningham Cheveley the elder and Louisa Mary his wife jointly, were, as to the estate thereby appointed to Jane Cheveley, well revoked by the subsequent deed of revocation and appointment of the 29th of March, 1773, executed by Louisa Mary Cheveley alone ? and if the same were well revoked thereby, whether Jane Cheveley took under the last mentioned deed of appointment any and what estate in the manor of Garlands, and the other premises in question, which she had power to dispose of by will.

Adam, for the plaintiffs. — 1st, The deed of 1773 was not [449] a good revocation of the deed of appointment of the 22nd September, 1768, not being made in conformity to or consistent with the articles of 1730, from whence the power moved. By those articles a power of appointment unto and among all or any of the children of the marriage, with or without a power of revocation, was given to the husband and wife, or the survivor of them, to be exercised from time to time by him, her, or them. The words indeed are general, but the meaning evidently was, that if the husband or wife alone appointed, he or she alone might revoke their own appointment ; but if both appointed, the revocation could only be by both : in other words, the same authority which made was required to revoke the appointment. The reason of this is evident ; for it would have been nugatory to give a power of appointing jointly, if either singly could revoke the act : nor would it be reasonable that either might undo what both had determined to be the most proper method of providing for their family. Then the husband and wife having made a joint appointment by the deed of 1768, it was not competent for the wife after his death to revoke it and make a new appointment. Nor was it in their power by the deed of 1768 to reserve a power of revocation to the survivor of them larger than the articles and settlement allowed ; or if so reserved, would it be valid. By the deed of appointment of 1768, Jane Cheveley the daughter took a vested remainder in fee after the determination of the life estates of her parents. But, 2ndly, if that deed were well revoked by the deed of 1773, Jane Cheveley still took a vested remainder in fee under it, which passed

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by her will to the plaintiffs. He admitted, that unless the [450] case of *Dor d. The Duke of Devonshire v. Crenulish* (Hil. 22 Geo. III. B. R.), cited in 4 T. R. 741, would support an appointment to the grandchildren, it was impossible to contend that the power here given enabled the husband or wife to make an appointment to any other than the children of the marriage. (And the Court intimating a decided opinion that the power could not otherwise be executed than among the children, he abandoned that point.) But he contended, that though the execution of the power were void as to the excess, yet the subsequent limitation over to one who was an object of the power would be good, as in *Crompton v. Barrow*, 4 Ves. 681 (p. 445, *ante*); inasmuch as there were no children of Jamineau or Jerningham Cheveley, the sons, to whom estates for life were limited, with remainders to their first and other sons in tail male; in default of which issue the remainder over in fee was limited to Jane Cheveley.

[Lord KENYON, Ch. J. — Did not that case go upon the ground of its being an appointment upon a contingency with a double aspect; and therefore that the contingency which went beyond the power not having happened, it should not stand in the way of those who might take under the appointment in the event which happened, and who were within the power?]

Admitting that distinction, still the appointment here may hold good by giving the sons estates in tail male, by the doctrine of *ex præ*, in order to carry into effect the general intent; as in *Chapman v. Brown*, 3 Burr. 1626, *Pitt v. Jackson*, 2 Bro. C. C. 51, and *Robinson v. Hardecastle*, 2 T. R. 245, 781 (1 R. R. 467). Here the [451] general intent was to give the sons estates for life, and the daughter, Jane Cheveley, the remainder in fee; and the particular intent was to give intermediate estates tail to persons who were not within the scope of the power, namely, the male descendants of the sons: therefore the only method by which the particular intent can be most nearly effectuated consistent with the general intent is, by giving the two sons successive estates in tail male, with remainder in fee to the daughter.

[Lord KENYON, Ch. J. — The doctrine of *ex præ* goes to the utmost verge of the law, even in the construction of wills; and we must take care that it does not run wild. But it has never been applied to the construction of deeds. The cases cited were questions upon wills. Perhaps no person has carried the doctrine further than I

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did when MASTER OF THE ROLLS, sitting for the LORD CHANCELLOR, in the case of *Pitt v. Jackson*. That also was the case of an appointment by will; and I know that great Judges entertained considerable scruples at the time concerning that decision. It went indeed to the outside of the rules of construction; yet still I do not think it was wrong.]

At any rate then this case is distinguishable from all the rest: inasmuch as the appointment of 1773 was made by a deed to which all the parties, being of full age, who were enabled to take under the power, and alone interested in it, were parties: their consent therefore will aid the execution of it in this manner; and it is not now competent to other parties to object to it.

Const, *contrà*. — First, it is now ¹ clear that the wife after her husband's death had a power to revoke the former joint [452] appointment; such power is expressly reserved to the survivor of the husband and wife by the original articles and settlement. It is also clear, that under a power of appointment to children, grandchildren or other descendants cannot be included. *Alexander v. Alexander*, 2 Ves. 640; but the power must be executed amongst the children alone. If, indeed, the execution of the power by the deed of 1773 were to refer back to the articles, it might be doubtful how far any part of the appointment was good: for, as was said by BULLER, J., in *Robinson v. Harcastle*, 2 T. R. 251 (1 R. R. 467), every execution of a power must be coupled with the power itself, so that those who claim under the execution must derive their title from the power. And he considered that an appointment for life only to a person not *in esse* at the creation of the power would be bad; and cited a case of *The Duke of Marlborough v. Lord Godolphin*, 2 Ves. Sen. 61 (p. 397, *ante*),² in support of that position.

[Lord KENYON. — An unborn child may be made tenant in tail, but not tenant for life, with a limitation to his children as purchas-

¹ Lord KENYON in the course of the argument had expressed a strong opinion to this effect, which he afterwards repeated.

² This, though differing in the title of it, seems to be the same case, or at least upon the same question as the case reported in 5 Bro. P. C. 592, under the name of *Lord Charles Spencer and others v. the Duke of Marlborough, Lord Godolphin and others*.

The attempt there was not merely to limit by a new appointment an estate for life to a person not *in esse* at the creation of the power, but further to limit an estate tail to the issue of such unborn person. *Vide supra*, what was said by Lord KENYON on this subject; and *Godolphin v. Godolphin*, 1 Ves. 21, and *Thellusson v. Woodford*, 4 Ves. 227 (4 R. R. 205).

ers. I remember hearing Lord MANSFIELD say, that when the case alluded to was to be argued in the House of Lords, there was found to be a mistake in the printed reasons on the part of those who opposed the execution of the power in the manner intended; [453] for it had been stated, that there could not be a limitation to an unborn child for life, but that was found to be wrong; for certainly there may be such a limitation: they therefore cancelled that reason and framed another, stating the proposition to be, that there could not be a limitation to an unborn child for life, with limitations to the issue of such unborn child in succession: and that doctrine was afterwards distinctly laid down by the learned Judge who delivered the opinion of the Judges in the House of Lords.]

Admitting then that the power was well executed by the deed of 1773, as far as it goes, and that it will be only void for the excess, according to *Robinson v. Hardeastle*, 2 T. R. 241 (1 R. R. 467), and other cases; here it will be good as far as it gives estates for lives to Jane Cheveley and Jamineau; but the next remainder to trustees, who are not within the power, and all the subsequent remainders which depend thereon, will be void; and that will include the ultimate remainder to Jane Cheveley in fee, although she was within the power. For this purpose the cases before cited, and that of *Adams v. Adams*, Cowp. 651, are in point.

Adam, in reply, maintained that the deed of 1773, if not good as an appointment *cy près* of estates tail to the sons with the remainder in fee to Jane Cheveley, was altogether void as an appointment for life only to persons not *in esse* at the creation of the power. Then if void as a new appointment, it would also be void as a revocation, and therefore the deed of 1768 would be set up again.

[454] Lord KENYON, Ch. J. — We shall certify our opinion to the LORD CHANCELLOR. At present, however, I see no reason to doubt but that the appointment by the wife alone, by the deed of 1773, was a good appointment as far as it is warranted by the power, and that it is a good revocation of the prior appointment of 1768. The marriage articles meant to give a joint power of appointment to the husband and wife during their lives, and after the death of either, that the survivor should have equal power to revoke and make a new appointment. It seems clear that an equal degree of

confidence was reposed in both husband and wife; and as it could not be foreseen what alterations the exigency of the family might from time to time require, it was thought more prudent to leave the survivor of them, whichever it might be, the same power to mould the appointment that had been committed to both while living. The next point is too well settled to be broken in upon. The wife had no power under the articles to appoint to the children of unborn children, but she was confined to execute her power among the children. So far, therefore, as she appointed an estate for life to the daughter, Jane Cheveley, with remainder for life to Jamineau, she did well; beyond that she exceeded her power in appointing to the issue of Jamineau, and therefore the excess is void. But it is equally clear that she did not intend that the subsequent limitation over to Jane Cheveley should be accelerated; but it was made to depend upon the intermediate limitations to the issue of her brothers, and she was not to take till their issue male were extinct. Those intermediate limitations therefore being void, the ultimate remainder dependent upon them must also fall.

If, then, the appointment were originally bad for the excess, [455] the subsequent circumstances of the death of the brother, without having had issue, cannot make it good. The appointment must be legal at the time of its creation. Therefore the estate must go as in default of appointment, beyond the estates for life given to Jane and Jamineau, according to the directions of the settlement, to Jamineau in tail male, remainder to Jerningham in tail male, with remainder to the right heirs of the father.

LAWRENCE, J. — The case of *Robinson v. Hardeastle* is in point.¹

Afterwards the following certificate was sent to the LORD CHANCELLOR: —

This case has been argued before us by counsel; we have considered it, and are of opinion, that the deed of appointment of the 22nd of September, 1768, which was executed by Jerningham Cheveley the elder and Louisa Mary his wife jointly, was, as to the estate thereby appointed to the said Jane Cheveley, well revoked by the subsequent deed of revocation and appointment of the 29th of March, 1773, executed by the said Louisa Mary Cheveley alone.

¹ See *Bristow v. Warde*, 2 Ves. Jun. 336 (p. 356, ante).

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And we are of opinion, that under the said last mentioned deed of appointment, the said Jane Cheveley took an estate for life only in the manor of Garlands and the other premises in question, with a power to charge the same when she should be in the actual possession thereof, with any sum not exceeding £1000. And that [456] she did not take any estate in the said premises under the said last mentioned deed of appointment, which she had power to dispose of by will.

KENYON.

N. GROSE.

S. LAWRENCE.

S. LE BLANC.

May 18th, 1801.

On the subsequent hearing before the LORD CHANCELLOR, counsel for the plaintiff argued that the Court should execute the general intention of Mrs. Cheveley's deed of 1773 by giving her sons estates tail.

[7 Ves. 388] The Counsel for the defendants was stopped by the Court.

The LORD CHANCELLOR: —

[389] If you cannot find a case that has adopted the doctrine of *cy près* upon such a head as this, I will not introduce it in this instance. I do not see how to get at it either upon principle or authority. Suppose, instead of articles, an actual conveyance, reciting the marriage; that Jerningham Cheveley was to take a considerable personal estate; and he had thereby conveyed to the use of himself for life, without impeachment of waste; with remainder to his wife for life; remainder to trustees and their heirs, for a legal estate, but upon trust to convey according to these limitations: this settlement would be a contract, under which all the issue would be purchasers of the estates thereby limited; and under which the husband and wife would be purchasers of the powers given to them; and the issue would be purchasers of the estates after to be limited by a due execution of the power. But they must be limited by a due execution of the power, in order to raise them: for there is no equity whatsoever between one purchaser under the deed and another to raise any question, whether a different effect shall be given to the instrument, called

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an execution of the power; as is done in the cases that have been alluded to.

If it stood thus in 1773, the date of the execution of the power, the elder Mr. Cheveley would have had a vested estate tail; and his brother would have had an estate tail; and they would have a right both in law and equity to the enjoyment, unless their sister could produce some instrument, placing her prior to them in the order of limitation. Mrs. Cheveley executes her power by a deed, professing an intention to execute it according to the real meaning of the articles: revoking the appointment before made, with intent, I agree, to execute the power according to the real meaning of the articles. * This case does not come near *Pitt v. Jackson* and the other cases upon wills: first, as they are cases upon wills, not deeds; to which this doctrine has not been applied: secondly, those cases have at least gone, as Lord KENYON observes (1 East, 451), to the utmost verge of the law; and I shall find it very difficult to alter an opinion I have taken up, that it is not proper to go one step farther; for in those cases, in order to serve the general intent and the particular intent, they destroy both. But it is not necessary to go farther into them; for in those cases the Court have said, this is the legal effect of the language. There is no possibility of saying that here: nor could it be argued consistently with the real intention of the author of the deed; for I must suppose her conscious of the estate her sons had under the articles, and would have had under the settlement, if executed. Then she must contemplate them as having already estates tail; and that the reversion in fee was to be disposed of. Can it be said, her intention by this deed, with these limitations, was to throw in Jane's estate before her brothers, and to give them just what they had before; and that after the execution of that deed they were to have just what they had before, only in a different series of limitation?

The cases as to articles do not apply. In those cases the Court says, such words in articles shall be taken to denote such an intent; and the conveyance shall be according to the intent so manifested. In *Highway v. Banner*, 1 Bfo. C. C. 584, the concurrence of both parents being necessary for barring the entail, a different construction was given to the words "heirs of the body," from that adopted in the other cases. But the question here is, not how to construe articles, so as to protect the issue * against | * 391

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the parent; but whether, where it is agreed on all hands, that there is no doubt as to the meaning, as between persons all alike purchasers, there is an equity for one to have the estate against the others, merely, because the parent exceeded the power given by the articles. Those cases do not apply; and there is no one authority, that upon the mere ground of the intention of the person executing you take away for the benefit of one child that estate, which for default of a due execution of the power was vested in the other child. The sons did not execute the deed with their mother. It is therefore her act alone; and there is nothing to bind them.

The bill was dismissed.

ENGLISH NOTES.

Where the donee of a power has by will appointed to A., an object of the power, for life, with remainder to his first and other sons who are not objects, the Court has applied the principle of carrying out the intention *cy près* by giving A. an estate tail. *Pitt v. Jackson* (1786), 2 Bro. C. C. 51. As to the limits of this application, see *Bristow v. Ward* (1794), p. 356, *ante* (2 Ves. Jr. 336, 2 R. R. 235). And see *Stackpole v. Stackpole* (1843), 4 Dr. & War. 320; *Mouppenny v. Dering* (1852), 2 De G. M. & G. 145, 22 L. J. Ch. 313.

In *Crozier v. Crozier* (1843), 3 Dr. & War. 353 (already cited at some length under No. 7, p. 422, *ante*), A., having under a deed power to appoint land by will to his children, made his will devising the land to his wife for life upon condition of maintaining and educating his children, and directed that a part of the residue to be ascertained as directed should be accumulated for payment of certain legacies to his younger children, and then devised the land to his eldest son in fee. It was held that the direction for maintenance and education of the children, and the gift of the legacies to the younger children, was a good exercise of the power, but that *quoad ultra*, the life estate, purported to be given to the wife, was void, and the rents devised for that purpose fell under the provisions of the deed as in default of appointment.

No. 12. — Jones v. Winwood, 10 Simon, 150. — Rule.

No. 12. — JONES *v.* WINWOOD.

(1841.)

No. 13. — CHAMBERS *v.* SMITH.

(H. L. SC. 1878.)

RULE.

A PERSON cannot, by exercising a power of appointment, derogate from his own previous conveyance so far as relates to a use limited to him in default of appointment: but the transfer of his interest will not prevent his exercise of the power so as to defeat all other uses limited in default of appointment. And a discretionary power given to trustees having the paramount title cannot be defeated by the conveyance or act of another in whom the beneficial right is vested, subject to the exercise of the power.

Jones v. Winwood.

10 Simon, 150-165 (s. c. 10 L. J. (N. S.) Ch. 165).

Power. — Exercise in Derogation of Previous Conveyance, Bad. — Quoad ultra, Good.

In 1819, an estate was settled to such uses as W. T. D. and F., his [150] wife, should, during their joint lives, appoint, and, in default of appointment, to the use of W. T. D. for life, with remainder to trustees to preserve, &c., with remainder to the use of the wife for life, with remainder to trustees to preserve, &c., with remainder to the use of the sons of W. T. D. and his wife, successively in tail, with remainder to the use of their daughters as tenants in common in tail, with cross-remainders in tail, with remainder to W. T. D. in fee. In 1824, W. T. D. took the benefit of the Insolvent Debtors' Act, and conveyed all his estate to the provisional assignee. In 1828, W. T. D. and F., his wife, in execution of their joint power, appointed the estate to trustees in fee in trust to sell. The trustees afterwards sold the estate. *Held*, that the power of appointment was not destroyed by the conveyance to the provisional assignee; and that the appointment of 1828 vested in the trustees the whole inheritance in fee, except that portion of it which was vested in the provisional assignee.

The bill was filed for the specific performance of an agreement entered into, on the 15th of November, 1833, by the plaintiffs, Isaac Jones, Patrick Brown, and William Thomas Davies, for the sale of an estate, in the parish of Kilie Ayron in Cardiganshire, to Henry

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Q. Winwood, for £3801. Some time after the agreement was made, Henry Q. Winwood assigned the benefit of it to his brother, the defendant John Winwood. The purchaser's counsel having perused the abstract of title to the property, and being of opinion that the exercise of a power of appointment by Davies, by an indenture of the 17th of September, 1828, was invalid at law, and, therefore, that the plaintiffs could not make a good title to the estate, the parties agreed, on the 1st of July, 1835, that a suit should be instituted for the specific performance of the agreement of 1833, and that the purchaser should not, either in the Master's office or before the Court, take any objection to the title except the one before alluded to; and, if a specific performance should [*151] be decreed, that he would consent to its being *decreed with costs; and, if the bill should be dismissed, that he would pay the plaintiff's costs as well as his own.

The defendant's answer contained the following statements with respect to the title to the estate.

That it appeared, by the abstract, that the hereditaments and premises were, under and by virtue of indentures of lease and release of the 27th and 28th of December, 1819, and a fine and recovery levied and suffered in pursuance thereof, settled (after certain uses which had since determined) to such uses, upon such trusts and, generally, in such manner as the plaintiff W. T. Davies and Frances his wife should, from time to time during their joint lives, by any deed or deeds, instrument or instruments in writing to be by them jointly sealed and delivered in the presence of and attested by two or more credible witnesses, appoint, and, in default of such appointment, and in the mean time, subject thereto, to the use of W. T. Davies and his assigns for his life, with remainder to the use of a trustee and his heirs, for the life of W. T. Davies, upon trust to preserve contingent remainders, with remainder to the use of Frances the wife of W. T. Davies and her assigns, for her life, with remainder to the use of the trustee and his assigns, during the life of Frances Davies, upon trust to preserve contingent remainders, with remainder to the use of the first and other sons of W. T. Davies and Frances his wife successively in tail general, with remainder to the use of the daughters of W. T. Davies and Frances his wife, as tenants in common in tail general, with cross-remainders between and among them in tail general, with remainder to the use of W. T. Davies, his heirs and assigns: that,

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by indentures of *lease and release of the 26th and [* 152] 27th of March, 1823, the hereditaments and premises were, in exercise of the joint power of appointment reserved to W. T. Davies and Frances his wife by the indenture of the 28th of December, 1819, appointed and conveyed by them unto and to the use of John Herbert, Esq., his heirs and assigns, subject to a proviso, whereby it was declared that, upon payment by W. T. Davies to Herbert of £1400, with lawful interest, at the time therein mentioned, Herbert, his heirs or assigns, would reconvey and assure the hereditaments to the uses and upon and for the trusts, intents, and purposes and with, under, and subject to the powers, provisos, declarations, and agreements expressed and declared, concerning the same, in and by the indenture of the 28th of December, 1819, or as near thereto as might be and circumstances would permit: that W. T. Davies, in August, 1824, was discharged from prison under the provisions of the Insolvent Debtors' Act; and, thereupon, by an indenture of bargain and sale of the 6th of August, 1824, he, pursuant to the directions of the Act, bargained and sold all his estate in the hereditaments¹ to the provisional assignee of the estates and effects of insolvent debtors in England, who, by an indenture of bargain and sale of the 18th of April, 1825, conveyed the same to the plaintiff Isaac Jones (the assignee appointed by the creditors of W. T. * Davies): that, after the [* 153] discharge of W. T. Davies under the Insolvent Act and the execution of the indentures of bargain and sale as aforesaid, W. T. Davies and Frances, his wife, by an indenture of appointment of the 17th of September, 1828, in exercise of the power of appointment to them reserved or given by the indenture of release of the 28th of December, 1819, and the fine and recovery levied and suffered in pursuance thereof, appointed the hereditaments and premises, subject to the mortgage in fee to Herbert, unto and to the use of the plaintiff Patrick Brown and Jenkin Beynon (the latter of whom never acted under, and afterwards duly disclaimed the trusts of the deed of appointment), their heirs and assigns, upon trust for sale: and, under which indenture of appointment,

¹ According to the case made for the opinion of the Barons of the Exchequer, as after mentioned, all the estate, right, title, interest, and trust of W. T. Davies, to all his real and personal estate and effects, in possession, reversion, remainder,

or expectancy, except the wearing apparel and other such necessities of the insolvent and his family not exceeding, in the whole, the value of £20, were conveyed and assigned to the provisional assignee, his successors and assigns.

the plaintiff P. Brown, as the acting trustee, claimed to be seised of the equity of redemption in fee simple of the hereditaments and premises, or, at all events, to have full power, in conjunction with the mortgagee of the hereditaments and premises and Isaac Jones, to make a title to the fee simple of the hereditaments and premises, discharged from the uses and limitations of the indenture of the 28th of December, 1819: but that he, the defendant, was advised and submitted that W. T. Davies had no power or right, after his insolvency and the execution by him of the bargain and sale of his real estate to the provisional assignee of the Insolvent Debtors' Court, to concur with Frances his wife in the execution of the power of appointment reserved to them by the indenture of the 28th of December, 1819; and that no estate was vested in P. Brown under such appointment; inasmuch as the power of appointment was destroyed by the insolvency of W. T. Davies and the execution of such bargain and sale as aforesaid.

[*154] * At the hearing of the cause on the 7th of April, 1837, it was ordered that a case should be made for the opinion of the Barons of the Exchequer on the following questions.

First, whether the power of appointment contained in the indenture of release of the 28th of December, 1819, in the pleadings mentioned, was or was not destroyed by the conveyance of the 6th of August, 1824, by the insolvent, William Thomas Davies, of all his estate to the provisional assignee in the pleadings mentioned?

Second, if the power was not destroyed, what estate passed under the appointment made by the indenture of the 17th of September, 1828, in the pleadings mentioned?

The case having been argued, the Barons of the Exchequer returned a certificate in favour of the title,¹ accompanied by the following reasons:—

“ In this case we propose to give the reasons which have induced us to give our certificate to the LORD CHANCELLOR in favour of the plaintiff.

“ By the original conveyance, dated the 27th and 28th of December, 1819, certain lands were settled to such uses as William Thomas Davies and his wife should, at any time or times, and from time to time, during their joint lives, by deed or other instrument in writing, duly executed, direct and appoint, and, in default of and until such appointment, to the use of William Thomas

¹ See the certificate, p. 471, *post*.

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* Davies for life, with remainder to trustees to preserve, [* 155] &c., and, then, to the use of his wife for life, and, then, in like manner, to the use of his sons, in succession, in tail general, and then to the use of the daughters in tail general, with cross-remainders, and with remainder in fee to William Thomas Davies himself. In 1824, William Thomas Davies took the benefit of the Insolvent Act, and conveyed, to the provisional assignee, on the 6th of August, 1824, all his interest in the premises, which was subsequently transferred, by the provisional assignee, to Isaac Jones, the assignee of the estate, in the usual way. Under these circumstances, William Thomas Davies and his wife, in execution of their joint power of appointment, conveyed, on the 16th and 17th of September, 1828, by lease and release, the premises to Patrick Brown and Jenkin Beynon, in fee, upon trust for the creditors of William Thomas Davies. And the point to be considered, is whether, by this appointment, any estate passed, and what estate, to the trustees.

“The first question is whether the power was revoked by the conveyance to the provisional assignee: and we are of opinion that it was not. Indeed, on this part of the case, there seems to be little difficulty. No authority was cited for the proposition, contended for by the defendant’s counsel, that where, by previous conveyance, a party has prevented himself from executing a power as fully as he could have originally executed it, the power is at an end. Nor can any such proposition be maintained. Even upon the authority of the decision of *Badham v. Mee*, 7 Bing. 695. 1 Myl. & K. 32, as explained by Sir JOHN LEACH, this question may be answered in the negative. For he considered the power as not well executed in that case because the particular limitations made by the appointment *under it, could not have been [* 156] valid, if introduced into the original deed creating the power. But, if the previous conveyance had altogether put an end to the power, such reasons would have been wholly unnecessary.

“Now it is obvious, as was indeed pointed out by the Court in the course of the argument, that limitations might have been made, subsequently to the conveyance in 1824, which would apply to the life estate of the wife and the estates tail of the children, and which might have been legally introduced into the original deed, and, consequently, upon the principles stated in *Badham v. Mee*, such an execution of the power would have been valid; and, if any valid execution of the power could have been made, the first of the LORD CHANCELLOR’S questions must be answered in the negative.

"But, in truth, the whole case turns upon the answer to be given to the second question. For, if the execution of this power by the deed of September, 1828, be invalid, then no estate passed by it; and the original limitations contained in the deed of 1819, remain still in force.

"We think, after full consideration, this power was well executed, so as to convey the estate for life of the wife and the estates tail of the children, to the trustees under the deed of 1828.

"We cannot adopt the principle laid down, by Sir J. LEACH, in affirming the certificate sent by the Court of Common Pleas in *Badham v. Mee*. It is not clear that such was the ground on which that Court made their certificate, the reasons for which were not given by them.

[*157] * "We do not think it is right to translate, into words, the effect of the appointment under the power, taken in conjunction with the other circumstances, and then to consider whether such limitations could, according to the peculiar rules affecting the transmission of landed property, have been legally inserted in the original deed.

"The utmost extent to which the principle could be carried (and, looking at the principles which govern the execution of these powers which were originally mere modifications of equitable uses, taking effect, as directions to trustees, which bound their conscience, and which a Court of equity would compel them to perform, it may be questionable whether even this ought to be done) would be to insert the limitations actually contained in the appointment itself in the original deed, and then to examine whether such limitations would be repugnant to any known rule of law. Now, if we do that in this case, no difficulty will be produced. Here, if the limitation of the estate made, by the appointment under this power, had been inserted in the original deed, there would have been no incongruity upon the face of that instrument. A fee would have been given to Brown and Beynon, the trustees, and no more. But then, in considering what operation such a deed, good in point of form, will have, the Court looks at the other circumstances; and, finding that the insolvent had, previously, by an innocent conveyance (for such the assignment under the Insolvent Act must, we think, be considered to be), conveyed away his life estate and his remainder in fee, it adjudges that he cannot, by executing the power, derogate from his own previous conveyance, and concludes, there-

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fore, that the deed does not operate on the estates previously assigned.

* “The result, therefore, is that, by executing the power, [* 158] the insolvent conveys, to the trustees, all that had not been previously assigned, under the Insolvent Act, to his assignees. In conformity with this opinion, we shall send our certificate to the LORD CHANCELLOR.

“We have, however, to observe that no notice was taken in the argument of the previous mortgage for £1400, with a power of sale, to John Herbert. Our opinion, therefore, is given on the supposition that that deed forms no part of the case. If it does, we are not prepared to say that, at law, the execution of the power was not inconsistent with that conveyance.”

The following certificate was returned by the Barons of the Exchequer¹ :—

“We have heard this case argued by counsel and have considered it, and are of opinion, first, that the power of appointment contained in the indenture of release of the 28th of December, 1819, was not destroyed by the conveyance, bearing date the 6th of August, 1824, by the insolvent W. T. Davies, of all his estate, to the provisional assignee :

“And, secondly, that, by the indenture of the 17th of September, 1828, an estate in fee simple was conveyed, to the trustees therein named, subject, however, to the estate for the life of the insolvent, and (on failure of the intermediate estates) to the remainder in fee to the insolvent, which had been, prior thereto, conveyed to the assignees of the insolvent's estate.²

“ABINGER.

W. BOLLAND.

“J. PARKE.

E. H. ALDERSON.”

* The cause now came on to be heard on the equity [* 159] reserved.

Mr. Wigram, Mr. G. Richards, and Mr. Walford, for the plaintiffs, said that, as the purchaser had consented to a case being sent to law, which he was not bound to do, he was compellable to complete his purchase, provided the Court confirmed the certificate.

Mr. Knight Bruce, Mr. Jacob, and Mr. Rudall, for the purchaser : There are two questions in this case. First, whether the joint

¹ See M. & W. 653.

² The above was correctly taken from the copy of the certificate with which the reporter was furnished.

power of appointment given to Davies and his wife existed after the assignment to the provisional assignee: Second, if it did, whether it was well exercised by the deed of the 17th of September, 1828.

First: the power, in this case, is a general one; and there is no authority for saying that when such a power is annexed to a life estate vested in the donee, and that estate is transferred by him to another person, the power is, any longer, capable of being exercised by him. The cases of *Badham v. Mee*, 7 Bing. 695, 1 Myl. & K. 32, and *Hole v. Escott*, 2 Keen, 44, 4 Myl. & Cr. 187, are direct authorities against the power existing under such circumstances. Indeed, there is a stronger ground for holding that the power, in this case, is gone, than there was for holding that the powers in those cases were destroyed: for, there, the powers were merely powers of selection amongst certain specified objects, namely, the children of the donees; but, here, the power is a general [* 160] one; and, therefore, the donee might * have exercised it by appointing the estate to himself. There the appointment was in favour of the children; but, here, the appointment is against the children.

Secondly: The interest attempted to be created by the deed of the 17th of September, 1828, is illegal. It is a base fee with a remainder over: and, as no estate tail has been converted into a base fee, the estate to take effect on the determination of the base fee, cannot be barred (see 3 & 4 Will. IV. c. 74, s. 19).

Jones and Brown are united with each other in the contract for sale. They are trustees for different classes of creditors and for different purposes. Who is to give a receipt for the purchase-money: and who is to apportion the purchase-money between them?

The Court of Exchequer cannot overrule the decisions in the Court of Common Pleas and in this Court. Where there are conflicting decisions upon a point affecting the title to an estate, this Court never compels the purchaser to complete his purchase.

Mr. Rudall referred to Co. Litt. 265 a; *Albany's Case*, 1 Co. Rep. 111; *Edwards v. Slater*, Hard. 410; *Clerk v. Pywell*, 2 Keb. 555; *Penne v. Peacock*, Ca. temp. Talb. 41; *Doe v. Britain*, 2 B. & Ald. 93; *Fearne Cont. Rem.* 74; *Price v. Strange*, Madd. & Geld. 159; *Willcoe v. Bellairs*, Turn. & Russ. 491; *Sharpe v. Adcock*, 4 Russ. 374; and *Blosse v. Lord Clarmorris*, 3 Bligh, 62.

* Mr. Wigram, in reply: —

[* 161]

The conveyance to the provisional assignee, being an innocent conveyance, did not destroy the power in gross. The case of *Badham v. Mee* is no authority against the certificate of the Barons of the Exchequer; for that case was decided merely on the ground that the appointment, being an appointment of an estate in fee, would not have been good if it had been contained in the deed creating the power. All that the Court decided in *Doe v. Britain*, was that the donee of the power could not derogate from his own grant. In *Hole v. Escomb*, the contingent remainders to the children had failed for want of a freehold to support them; and then the case became just the same as if there never had been any such contingent remainders. The LORD CHANCELLOR commences his judgment by saying that he does not mean to discuss the question in *Badham v. Mee*: and his Lordship held the appointment, in the case before him, to be bad, because, the contingent remainders having failed, the father was exercising the power so as to take effect out of the fee, that is, to defeat his own grant. That case was decided solely on the ground that the contingent remainders had failed for want of a freehold to support them. The judgment does not at all proceed upon the assumption that the decision in *Badham v. Mee* was right; and it has never been spoken of as a decision that can be supported.

It was said that the appointment made by the deed of the 17th of September, 1828, was bad, because, by it, a fee was mounted on a fee; but it has been settled, for a series of years, that a base fee may exist in one person, and a remainder in fee, in another, to take effect on the determination of the base fee.¹

* The VICE-CHANCELLOR: —

[* 162]

I shall take time to consider the questions which have been discussed in this case; as a great deal has been said which requires much consideration.

18th Feb. The VICE-CHANCELLOR: —

The first question before me, is whether the certificate of the learned Judges of the Court of Exchequer, shall be confirmed.

I am clearly of opinion that it ought to be confirmed.

¹ Mr. Wigram, in the course of his *ham v. Mee*, in p. 80; and also to *Rattle v. Popham*, Str. 992. reply, referred to 1 Sugd. Pow. 44, 45, and 72: and to the observations on *Bad-*

They have thought fit to give the reasons for their opinion, and, with those reasons, I, in substance, coincide.

It is impossible to read the report of *Badham v. Mee*, in 7 Bing. 704, without supposing that the ground upon which the Judges of the Court of Common Pleas, in 1831, rested their opinion, was really that which Sir J. LEACH, according to the report in 1 Mylne & Keen, p. 54, assumed to be their ground for giving the certificate, and made his ground for confirming it in 1832.

That ground plainly admitted that, notwithstanding the bankruptcy of Richard Mee, his power of appointment among his sons, subsisted, as unquestionably it did, subject only to this restriction,

that he could not exercise it to the prejudice of his assignees, who were * entitled to the fee in remainder after

the estates in tail general limited to the sons in succession. That remainder in fee the assignees took under the limitation in default of and subject to any appointment under the power, whether any prior estate tail might or might not be enlarged into a base fee. Moreover, the bankrupt, Richard Mee, did not, in execution of his power, appoint a base fee, so as to give ground for the objection that Sir J. LEACH assumed. But the bankrupt appointed, in fee simple, to his son; and the law provided that the appointment should not affect the remainder in fee, which the assignees had, previously, acquired by virtue of the limitation in default of appointment. The remainder in fee, therefore, which the assignees took at first, continued in them unaffected by the exercise of the power.

The case of *Thorp v. Goodall*, 17 Ves. 388, 460, 1 Rose, 40, 270, and the Act 6 Geo. IV. c. 16, s. 65, 77, prove that, even in a case where a bankrupt, but for the execution of a power by him, would be tenant in tail, the power, as well as the estate tail, is vested in the assignees.

In the present case, subject to the joint power of appointment given to the husband and wife, the estate for life and the ultimate remainder in fee limited to the husband, passed, under the indentures of 6th August, 1824, and 18th April, 1825, to Isaac Jones, the insolvent's assignee; and the appointment of September, 1828, was an appointment in fee, which, by operation of law, vested the whole inheritance in fee simple in Brown and Beynon, except only that portion of it which was already vested in Isaac Jones, and which, by law could not be affected

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by the appointment. The whole inheritance, except * that [* 164] portion, was then vested in the trustee to preserve contingent remainders, in the wife for her life, and comprehended the contingent remainders to the children. The joint power of appointment might have been exercised, in various ways, without injuring the estate of Isaac Jones. It might have made his estate neither better nor worse by appointing that the daughters should take, in tail general, before the sons. It might have made his estate better, by appointing the fee, at once, to him.

I give my opinion upon this part of the case, as it would have stood if the mortgage of 1823 had not been executed.

The mortgage, certainly, does not make the title worse, but rather better; as, under it, the legal estate in fee may be acquired.

The next question is, if the certificate be confirmed, ought the Court to decree the defendant to take the title.

And I am of opinion that the Court ought to do so.

Though I am clear in opinion that the certificate is substantially right, I am free to admit that, in the abstract, the certificate of the Court of Common Pleas, confirmed by Sir J. LEACH, must create a doubt, when there is only opposed to it the certificate of the Court of Exchequer.

But it is impossible to read the pleadings in this cause, and not to see that the real intention of the plaintiffs and the defendant was to call in question, as Sir WILLIAM FOLLETT, according to the report in 3 Meeson * and Welsby, is stated to have said, [* 165] the authority of the decision in *Badham v. Mee*; and that, if it should be held that the decision in *Badham v. Mee* was not law, the defendant should take the title. It would have been absurd to have made the agreement of the 1st of July, 1835, upon the supposition that, if a decision were made against *Badham v. Mee*, the defendant should still not take the title, on the ground that decision against decision left the matter in doubt. The utmost that could have been expected in favour of the title, was that a decision might be obtained in opposition to that in *Badham v. Mee*.

And, as I understand the agreement of the 1st of July, 1835, the objection to the agreement of the 15th November, 1833, in respect of its having been made, by Isaac Jones and Patrick Brown, for a sale at one entire sum, is one that cannot now be taken.

The decree must therefore be to confirm the certificate, and order a specific performance with costs to be paid by the defendant.

Chambers and others v. Smith and others

3 App. Cas. 795-830.

[795] *Trust. — Settlement. — Unlimited Discretionary Power of Trustees to postpone Payments. — Arrestment by Creditors ineffectual to bar the Exercise of the Trustee's Power.*

Where trustees have an unlimited discretionary power to postpone, as long as they think fit, the payments of shares of a residuary fund: and where of the time and manner of exercising the power they are to be the sole and final judges, arresting creditors of the fund will be defeated by the trustees executing, even after action raised, a deed applying the fund as an alimentary provision for the behoof of the beneficiaries. No proceedings resorted to by creditors of the beneficiaries can in such a case abridge the powers of the trustees.

A testator directed his trustees to hold the residue of his estate for the behoof of his children, "with and under the modifications to be afterwards stated." The shares of residue were to vest at the testator's death, and be payable six months after his decease: but powers were given, "notwithstanding the period above appointed for payment of the shares of the residue," to the trustees "to postpone as long as they should think it expedient to do so, the payment of the provisions or shares of residue in the case of all or any of the children [*796] or grandchildren, . . . and to apply the interest or annual *produce of the same during the period of the postponement, to or for behoof of such children or grandchildren, or, by a deed under their hands, to retain the said provisions, or any of them, vested in their own persons, or to vest the same in the persons of other trustees, . . . so that the children and grandchildren, or any of them, as the case might be, might draw and receive only the interest or other annual proceeds of their respective provisions during their lives, or for such time as the trustees might fix, and that the capital might be settled on or for behoof of such children or grandchildren, and their lawful issue, on such conditions and under such restrictions and limitations, and for such uses as the trustees in their discretion might deem most expedient, of which expediency, and the time and manner of exercising the powers and option hereby given, they should be the sole and final judges."

The trustees during a period of five years after the testator's death paid the whole of the interest, and a part of the capital of his share to J. C., a son of the testator. Subsequently judgment creditors of J. C. used arrestment in the hands of the trustees against the balance of the residue of his share still due to J. C., and raised an action of forthcoming. Thereupon the trustees executed a deed restricting the right of J. C. to a life rent, and settled the fee on his children: and again by another deed they resolved to hold the balance, and apply the interest as an alimentary fund for J. C.'s behoof: —

No. 13. — *Chambers and others v. Smith and others*, 3 App. Cas. 796, 797.

Held, reversing the decision of the Court below, that the arrestment could not in any way abridge the ample discretionary powers of the trustees; and that the trustees were at liberty to withhold from J. C., or any one claiming under him, the payment of either principal or interest as they might think occasion required.

Per Lord O'HAGAN. — The mere declaration of the trustees' resolution to postpone, however made, is sufficient to render the fund unattachable by creditors.

The following abstract of the facts and pleadings is taken from the opinion of Lord HATHERLEY, and also from that of Lord BLACKBURN: —

The appellants in this case are the trustees under a testamentary disposition of the late Dr. Robert Chambers, one of the partners of the firm of W. & R. Chambers, publishers in Edinburgh; and the respondents constitute a firm of sharebrokers at Sheffield, who claim to be creditors for a sum of £2294 1s. 10*d.* on account of principle and interest due on three bills of exchange and £4 6*s.* costs, as against James Chambers, one of the sons of the testator Dr. Robert Chambers. The respondents have by due process obtained judgment (10th June, 1878; Ex. D. at Westminster), as against James Chambers their debtor, and have proceeded to arrest in the hands of the above trustees all funds belonging to James Chambers, and by an action of forthcoming * and payment commenced in September, 1876, [* 797] sought to render available the arrested funds for payment of their claims.

The trust disposition of Dr. Chambers, dated the 10th of November, 1870, after appointing his eldest son Robert Chambers, and others (now represented by the appellants) trustees for executing the trusts of the deed, and making several dispositions of property, disposed of the residue in the following words: —

“Lastly, in regard to the residue of my means and estate remaining after fulfilment of the foregoing purposes of this trust, I appoint my trustees to hold, apply, pay, and convey the same, and the interest and other annual produce thereof, to and for behoof of the children of the marriage between me and Mrs. Anne Kirkwood or Chambers, now deceased, equally among them, with the exception of my son, the said William Chambers, and with and under the exceptions and modifications to be afterwards stated, payable in the case of such as are major six months after my

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decease, declaring that the whole provisions in favour of my said children shall at my death vest in those surviving me, . . . and notwithstanding the periods above appointed for the payment of the shares of the residue of my means and estate, I provide and declare that it shall be lawful to and in the power and option of my trustees, if they see cause and deem it fit, to postpone as long as they shall think it expedient to do so the payment of the provisions or shares of residue hereinbefore provided as aforesaid in the case of all or any of my children or grandchildren, and to apply the interest or annual produce of the same during the period of the postponement to or for behoof of such children or grandchildren, or, by a deed under their hands, to retain the said provisions, or any of them, vested in their own persons, or to vest the same in the persons of other trustees (whom they are hereby authorised to appoint), with all or any of the powers, privileges, and exemptions belonging to themselves, including the power of appointing factors, so that my children and grandchildren, or any of them, as the case may be, may draw and receive only the interest or other annual proceeds of their respective provisions during their lives, or for such time as my trustees may fix, and that the capital may be settled on or for behoof of such children or grandchildren, and their lawful issue, on such conditions and under such restrictions and limitations, and for such uses as my trustees in their discretion may deem most expedient, of which expediency, and the time and manner of exercising the powers and option hereby given, they shall be the sole and final judges.”

The testing clause of the settlement was as follows :

“ In witness whereof, I have subscribed these presents but with and under this express provision, and declaration, *videlicet*, that the whole of the legacies, annuity, and provisions made and provided by this disposition and deed of settlement shall be strictly alimentary, and shall not be arrestable or attachable for the debts or deeds of the persons in whose favour the same are conceived, or any of them, nor be subject or liable to the diligence of their creditors), at St. Andrews, upon the 10th day of November, in the year 1870, before these witnesses, &c.”

[* 798] * James Chambers, the debtor, is one of the children.

Dr. Chambers died in March, 1871.

The trustees realised the property of the testator, with the exception of his business, and a paper was put in, admitted by both

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sides to be correct, in which the result of an examination of the trust account was set out. That account showed that up to the 1st of June, 1875, the trustees paid to Mr. James Chambers sums of money considerably exceeding the amount of income on his share, his share of income to that date being stated as amounting to £2272 6s. 3d., and his total receipts to £4358 19s. 7d., so that £2086 13s. 4d., the overpayment, was charged to capital. He was further paid £474 17s. 2d. for income up to the 31st of March, 1876, and £150 on account from that date to the 6th of July, 1876, leaving a balance of about £3000 due to James Chambers, being more than sufficient to cover the respondent's debt.

In the trustees' defence to the action of forthcoming, in the correspondence the third answer originally stood as follows:—

‘ Admitted that the defenders, the arrestees, had not at the date of the arrestments, and have not since, executed any deed under their hands with reference to the share of the defender, Mr. James Chambers, in his father's estate. Admitted that a balance of the defender's share of residue is yet in the hands of the trustees. Explained that the amount of said balance has not yet been ascertained, but believed that it will probably be equal to the amount of the pursuer's debt. *Quoad ultra* denied, and explained that the trustees have thought it proper, and have resolved, to postpone the payment of the said balance, and to pay the interest only to Mr. James Chambers for his aliment, as provided in the trust-deed.’

After the action of forthcoming was raised, but before it was decided by the LORD ORDINARY, the appellants executed a deed of trust in favour of themselves for behoof of the said James Chambers and his children. This deed was dated the 10th, 13th, and 16th of January, 1877, and recited the main provisions of the testamentary disposition, including the attesting part of that instrument and the provision contained in the attesting clause as to the legacies being alimentary and not arrestable, and further stating that considering the payments already made to James Chambers, and that his share of the estate under their management was not more than was required as a suitable alimentary provision for himself and his family, they (the trustees) had deemed it fit to retain * the balance for the behoof of himself and his [*799] children as authorised by the settlement, and in manner after-mentioned they declare that the share shall remain vested in them, the trustees, in trust only for the behoof of James Chambers

during his life, and after his death for behoof of his children (naming them), and that so long as the said provisions shall be retained they shall remain vested in the trustees, and James Chambers, or his children, shall only be entitled to receive the interest or other proceeds during his and their lives, and that at such times and in such proportions as they, the trustees, might deem expedient.

By a second trust deed, dated the 6th, 9th, and 10th of July, 1877, they again recited the will, and expressly by this deed declared that the share of James should be in trust for him in life-rent for his life-rent alimentary use, and after his death for his children. The respondents, the arresting creditors, seek to obtain a decree of forthcoming to the extent of the debt due to them in respect of the interest and principal in the hands of the trustees under Dr. Chambers' testamentary disposition at the date of the process of arresting. The question is whether they are so entitled either as to principal or interest moneys, or any part thereof respectively.

The pleas in law for the pursuers (respondents) were:—

"1. The defender, the principal debtor, being due and owing to the pursuers the sums contained in the said extract judgment, the defenders, the arrestees, are liable to account to the pursuers for the said principal debtor's funds in their hands, in terms of the conclusions of the summons.

"2. Assuming that the declaration introduced into the testing-clause of Dr. Chambers' settlement is effectual to constitute an alimentary provision, the defender's share of residue is attachable to the extent of the surplus in excess of a reasonable alimentary annuity.

"3. In any event, the pursuers are entitled to have their arrestments made effectual to the effect of giving them a preference over the fee, or reversion of the said share of residue, subject to the burden of the defender's life interest."

The second and third pleas stated for the defenders (the appellants) were as follows:—

"2. Upon a sound construction of the said trust disposition and settlement, the trustees are entitled to retain in their hands the share of residue belonging to the said James Chambers, and to apply the interest of the same as an alimentary fund for his behoof.

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“3. The said trustees not being bound to pay the principal of the said share of * residue to the said James Chambers, either now or subsequently, the pursuers are not entitled to any decree of forthcoming.”

The LORD ORDINARY (Lord YOUNG), by his interlocutor, dated the 22nd of February, 1877, sustained these two pleas for the appellants, and dismissed the action.

The respondents took the case by reclaiming note to the First Division of the Court. Their Lordships of that division (on the 17th of July) allowed the record to be amended by the addition of the statement by the trustees of the execution of the said two deeds of trust of January and July, 1877, before mentioned.

The case was debated before their Lordships on the 20th of July, and also on the 18th of October, by one counsel on each side, with a special view to the application and effect of the declaration in the testing clause, and thereafter further heard on the 9th of November, 1877, when a judgment was pronounced, recalling the interlocutor of the LORD ORDINARY (Lord SHAND dissenting), and directing payment to the respondents of £2294 1s. 10d. and £4 6s. out of the share of James Chambers and his children (Scotch Cases, 4th Series, vol. v. p. 97; Scottish Reporter, vol. xv. p. 58).

The LORD ORDINARY's note to his interlocutor was not before the Judges of the Inner House.

On appeal to the House, —

March 21, 25, 26. Mr. E. E. Kay, Q. C., and Mr. J. C. Nicolson (of the Scotch bar), for the appellants, contended that upon a sound construction of the trust settlement they had power at any time before actual payment of the shares of residue to exercise the powers of retaining the capital of such shares, and of settling the same; and as to the manner and mode of doing this they were the sole judges. The trust settlement throughout exhibited an anxious desire on the part of the testator to guard against the effect of imprudent conduct on the part of the beneficiaries. The arrangement in question could only attach the common debtor's (Mr. James Chambers') right *tantum et tale*, as it stood in his person, and therefore subject to the exercise of the powers of retention and settlement conferred on the appellants. The rule of law that where a right has vested it may be attached by diligence, and that after diligence had begun nothing which subsequently

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[* 801] occurred could * alter the rights of parties as then existing, had no application to this case, because the interest which had vested in the common debtor was not an absolute interest, but was one of which it was an inherent quality that it should be subject to the exercise of the powers given to the trustees and the subsequent exercise of those powers was a contingency to which the arrestment was subject. A right not reduced to possession, and subject to defeasance at the will of trustees, was quite as conditional as a right which was in suspense until some condition was purified, therefore, the appellants having exercised the powers of retention by the deeds of January and July, 1877, were not bound to make any portion of the common debtor's share forthcoming to the respondents. On the construction of the trust settlement and powers of the trustees under it, they cited and commented on *Weller v. Ker*, L. R. 1 H. L. Sc. 11, 4 Macph. (H. of L.) 8, 38 Scotch Jur. 256; *Whitworth's Case*, 3 Hare, 416, aff. 1 Ph. 728; *Trappes v. Meredith* (Nov. 3, 1871), 10 Macph. 38, 44 Scotch Jur. 25; *Hunter v. Hunter's Trustees* (March 10, 1848), 10 D. 922, 20 Scotch Jur. 326; *Balderston v. Fulton* (Jan. 23, 1857), 19 D. 293, 29 Scotch Jur. 143; *Erskine*, b. 3, tit. 6, sect. 11; *Wickham v. New Brunswick and Canada Railway Company*, L. R. 1 P. C. at pp. 75, 76; *Watts v. Porter*, 3 El. & Bl. 743; *Eyre v. McDowell*, 9 H. L. Cas. at p. 642; *Kinderley v. Jervis*, 22 Beav. 1; *Duncan (Croom's Trustees) v. Adams* (Nov. 30, 1859), 22 D. 45. And as to aliment see *Mongpenney v. Earl of Buchan* (July 11, 1835), 13 S. 1112; *Lewis v. Anstruther* (Dec. 17, 1852), 15 D. 260; *Smith v. Innes* (May 29, 1855), 17 D. 778. [On the contention that the appellants were entitled to read as part of the trust settlement the declaration in the testing clause to the effect that the whole of the provision should be strictly alimentary, they also cited *Johnstone v. Coldstream* (June 30, 1843), 5 D. at p. 1309, 15 Scotch Jur. 541; *Dunlop v. Greenlee's Trustees* (Nov. 2, 1863), 2 Macph. 1, aff. June 2, 1865, 3 Macph. H. L. 46; *Kelso, Petr.* (March 8, 1850), 12 D. 918].

Mr. Southgate, Q. C., and Mr. R. T. Reid, contended for the respondents, that James Chambers had at the date of the [* 802] arrestment * a vested right to payment of the share of Dr. Chambers' residue held by the trustees for his behoof; and the effect of the arrestment was to attach the balance as his absolute property. No resolution or deed postponing payment or de-

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claring that they retained the residue had been come to by the trustees before the date of the arrestment, on the contrary during the four years after the testator's death the trustees had paid large sums to James Chambers; and therefore the trustees had thus decided to hold the balance of the residue as vested in James Chambers absolutely. The institution of the action of forthcoming rendered the fund litigious, and no change could afterwards be made in the rights of parties, therefore the second deed of July, 1877, executed after the case had been decided in the Court below, and which deed divested James Chambers of the fee and transferred it to his children, was of no avail. The deed executed in January during the dependence of the action was *ultrà vires* of the grantors. But assuming even that the trustees had the power to execute that deed after the date of the arrestment, they had no power of revocation; the power once exercised could not be revoked, unless expressly reserved, and that was not done; Sugden on Powers, 8th ed. 909, Appx.; case of *Hele v. Bond*, Prec. Chan. 474, 1 Eq. Ca. Abr. 342; *Worrall v. Jacob*, 3 Mer. 256; Sugden on Powers, 8th ed. p. 369; therefore whatever might have been the wish of the trustees, they had by the true construction of the terms of the January deed given irrevocably to James Chambers an absolute right to draw and receive the interest during his life, and consequently the respondents were entitled to have at the least that life interest. To create a fund alimentary, technical words must be used; Bell cites two cases, 7th ed. vol. i. p. 125, *Lord Kilcaldron v. Lord Balgillo* (1639), M. 10,372; *Gordon v. Blackburn* (1697), M. 10,394: but there were no words strictly technical in the will itself, and the testing clause could not make a deed alimentary which was not so already, and the deed of July was of no avail, the power having been previously exercised in executing the previous deed of January. The declaration in the testing clause to the effect that the legacies and the provisions should not be arrestable was improbative and ineffectual. The purpose of the testing clause* was to state the particulars of the execution of the deed; and it was filled up almost invariably after the deed had been subscribed. If the declarations affecting the subject-matter of the deed could competently be inserted in the testing clause, the effect of a deed as it stood when subscribed by the grantor might be entirely changed without his knowledge, and the deed nevertheless be probative.

No. 13. — *Chambers and others v. Smith and others*. 3 App. Cas. 803. 804.

The *Cases of Johnstone* (June 30, 1843), 5 D. 4297, *Doolep* (Nov. 2, 1863), 2 Macph. 1, aff. June 2, 1865, 3 Macph. (H. L.) 46, and *Kilso* (March 8, 1850), 12 D. 918, did not bear out the appellant's contention; and on the contrary *Arnott v. Kedder or Calder*, 12 S. 781, 13 S. 619, aff. 1 Rob. App. 183, 208, referred to by Lord DEAS (Scotch Cases, 4th series, vol. v. p. 116; see Lord DEAS' judgment also for various cases on this point), was strongly adverse to the introduction of substantial provisions in the testing clause. As to the functions to which the testing clause is limited; see Bell on Testing of Deeds, pp. 43, 44, 124. They also cited *Stair v. Stair*, 5 S. & D. 449, reversed 2 W. & S. 614.

Mr. E. E. Kay, in reply.

Lord HATHERLEY (having stated the facts as above):—

My Lords, I will first consider what is the true construction of the testamentary disposition of Dr. Chambers as regards his residuary estate.

I think that it is carefully and anxiously worded so as to give the trustees the largest powers over that residue until actual distribution of the respective shares. They are to "hold, apply, pay, and convey the same and the interest thereof to and for the behoof of" his children by his late wife equally among them, except his son William Chambers, and with, under, and subject to the exceptions and modifications to be afterwards stated.

These modifications will apply to the whole gift, and will modify the interest of every one of the children in that gift. He declares the provision to be payable to such as are major six months after his decease, but in the case of his daughter Alice on her attaining majority or being married, declaring that the whole provisions in favour of his children should at his death be

[* 804] vested * in their surviving issue. He then makes provisions for the issue of any child dying in his lifetime to take their parents' share, excepting his son William's issue. Then follows the most important clause. He declares that:—

"Notwithstanding the periods above appointed for the payment of the shares of residue of his moneys and estate, he provides and declares that it shall be lawful to and in the power and option of his trustees, if they see cause and deem it fit, to postpone as long as they shall think it expedient to do so, the payment of the provisions or shares of residue therein provided in the case of all or

No. 13. - Chambers and others v. Smith and others, 3 App. Cas. 804, 805.

any of his children or grandchildren, and to apply the interest or annual produce of the same during the period of the postponement to and for the behoof of such children or grandchildren."

Now, stopping here, we find a power in the trustees overruling all directions for payment and vesting before given, and directing them during the postponement to apply the interest for the behoof of the children. This must mean that the child is to have no control over the fund at all when the trustees resolve on postponement. If he could demand payment the power of postponement could be pleaded, and if any child were to take legal proceedings to enforce payment into his own hands of the money, it appears to me that, if any meaning is to be given to this clause, it would be a good plea to an action against the trustees for payment of the principal and interest, and they might say, "We have postponed such payment to you personally, and intend ourselves to apply the money for your behoof."

But the case does not rest there, for the trustees may by the will either do this, or by a deed under their hands may retain the provisions or any of them vested in their own persons, or vest the same in the persons of other trustees, whom they are authorised to appoint, so that the children and grandchildren or any of them, as the case may be, will receive only the interest or other annual proceeds of their respective provisions during their lives, or for such times as the trustees may fix, and the capital may be settled on or for the behoof of such child or the grandchildren and their lawful issue, on such conditions and under such restrictions and limitations, and at such times and in such manner as the trustees may in their discretion deem most expedient, of which expediency and the time and manner of exercising the powers and option thereby given, they should be the sole and final judges. Powers *are also given to the trustees for settling [* 805] accounts as to the partnership business in which Dr. Chambers was engaged with his surviving partners in winding up the estate generally.

Now, what is the effect of these two clauses together? It was said in argument before your Lordships that the option was a single option between two courses; that the positive direction was for vesting and payment to the children, but that the trustees might postpone the payment and retain the funds, paying the income to the beneficiaries, or for their behoof, on the one hand, or

No. 13. — *Chambers and others v. Smith and others*, 3 App. Cas. 805. 806.

they might at their option execute a deed giving a life-rent only to the testator's children or grandchildren on the other, and that this option should be declared and acted once for all at the time when payment became due, and this view seems to have received some countenance in part of Lord DEAS' judgment (*Scotch Cases*, 4th Series, vol. v. p. 104).

My Lords, it is an ordinary incident to a power that it may, unless controlled by some provisions of the instrument in which it is contained, be exercised at suitable periods as to portions of the property until the subject-matter of the power is exhausted, and here it seems to me a necessary construction that the power should continue to be exercised from time to time as required. The testator evidently contemplated a discretion in his trustees, for which reason he gives them the option of retaining the moneys and applying them, with their own hands as it were, to the use of the children, or of executing a deed by which they may appoint others to undertake the same duty for the future; and though by such deed the life-rent is to be given to a child, and the principal to his issue, yet it may be given with such restrictions and conditions and for such uses as the trustees in their discretion may deem most expedient, of which expediency and "the time and manner of exercising the power and option they are to be the sole and final judges."

I do not know any form of words which could more precisely confer on them and those who might succeed to the trust the power at any time of discharging their duty in the distribution of the testator's residue amongst his children and their issue in the manner which they should think proper. The scheme of the testamentary disposition is this: either pay to my children [* 806] and grandchildren * their shares (if they be of age), or hold in your own hands the share of any of them and apply it for his or her behoof instead of paying it to the child.

It appears to me that so long as the trustees retain any part in their own hands they are bound to employ it as they think best for the legatee's benefit, viz. either by paying it at any time they think fit to the legatee, or by paying it in his behoof, that is for his benefit, in such manner, and at such time, as they may think proper. This, by the law of Scotland, they could well do.

It will be noticed that in these observations I do not refer to the clause of attestation and the directions therein contained.

No. 13. — Chambers and others v. Smith and others, 3 App. Cas. 806, 807.

What then is the position of the trustees when a creditor seeks to arrest the fund in their hands, payment of which they have not yet made? They hold it in trust for the legatee, but subject to the powers conferred on them by the will. And with great respect, I conceive it to be a leading misconception in the judgment of the Court below that they have held that the arrestment can in any way affect the powers of the trustees, even, as the learned Judges have thought, to the extent of annihilating their trust.

Now, I understand, my Lords, the law of Scotland to be in no way different from that of England with reference to the effect of an arrest of a debtor's interest in the hands of third parties. It has been long settled in England that a judgment creditor must take his debtor's interest subject to all charges and modifications to which it is subject in the debtor's own hands, or as it is called, *tantum et tale*, otherwise there would be an act of the debtor conferring an interest on his creditor which he could not acquire for himself. The debtor, James Chambers, could not, I think, in the case before us, insist on payment to himself of any principal moneys or interest the payment of which the trustees under the powers contained in the testamentary disposition thought right to postpone; and for the same reason the arresting creditor cannot make that demand. The trustees might under the will, if they thought fit, pay any given creditor for necessaries, or take any other course to them appearing advisable for the benefit of the legatee, but could not be compelled to pay it as the legatee may direct.

What I have said applies to the position of the parties under the testamentary disposition alone, but by the two subsequent *deeds I think the trustees have finally settled the [* 807] disposal of the shares by giving a life-rent to the children and making it an alimentary provision for them.

The maxim *pendente lite nihil innovandum*, seems to me to have no place here. If I am correct in holding, as I do, that the trust powers could not be destroyed by the objects of them becoming indebted, which, indeed, seems the time at which the testator would have desired them to be brought into action, then the trustees are not innovating, but only exercising their rights as conferred upon them by their truster at their own discretion.

It appears to me that under the ample terms of the discretion so

conferred, they are at liberty to withhold from James Chambers, and from any claiming under him, the payment of either principal or interest, as they may think occasion requires, and that by the operation of the deeds they only limited this their power, which was general, as to the times and manner of its exercise, as they themselves, being sole judges, conceived to be expedient.

This view precludes the necessity of entering upon the somewhat vexed question of law that arises on the attestation clause of the testamentary document. This was held unanimously by the Court below to be incapable of being treated as a provision of the deed. After the cases cited before us as having been decided by this House, I should have taken more time to consider whether I could wholly acquiesce in the decision of the Court in Scotland on this point, but, for the reasons above mentioned, I am of opinion that the interlocutor of the First Division, complained of by this appeal, should be reversed, and that we should remit the case to the Court of Session, in order that they may assoilzie the defenders from the conclusions of the action with expenses.

No question will arise as to income since the last payment made, for the view I have taken extends both to income and principal till actual payment. Neither can there be any doubt that the first of the two deeds executed by the trustees, reciting, as it does, what they at least supposed to be part of the testator's will as contained in the testamentary clause, rendered the provision in life-rent thereby made itself alimentary.

No authority has established that the word "alimentary" must be used, and in this case, the machinery of the testamentary disposition [* 808] in effect empowers the trustees to deal with the property as they think best for the sole benefit of the legatees.

Lord O'HAGAN, after referring to the surrounding circumstances, and the provisions of the trust instrument, proceeded: —

[811] In this way the settlor provided that his purposes should be carried into effect, and the result was that the beneficiaries took an estate vested in them and, if the trustees thought proper, to belong to them absolutely at the periods indicated; but it was a qualified estate to be enjoyed by them only on the conditions and at the times which the trustees, in their uncontrolled discretion, should appoint.

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It seems to me, that the arrestment could not possibly affect this condition of things. What the debtor had, was attached for the benefit of the creditor; what he had not, the arrestment could neither give them nor take from him. It could not make the estate absolute, which was qualified. It could not take from the trustees the power which enabled them to deny its liability to attachment. What was his could be taken; what was not his, if the trustees intervened and exercised their right and duty to postpone, could not — *Tantum et tale*, as it was, and as he could claim it for himself, it might pass to his creditor or assignee; but no process of a Court could give to him or them that to which he was not legally entitled.

In this respect there is no distinction between English and Scottish law, and both of them are in accordance with reason and justice. James Chambers could not have forced his trustees, against their judgment and in disregard of their duty, to pay him, at once, the money the payment of which they deemed it expedient to postpone; and his creditors can have no higher right. Neither the debtor nor the creditor can be permitted to disregard the direction and defeat the purpose of the settlor of the property.

No special mode of postponement is prescribed by the deed of trust. The manner, as well as the time and the conditions of it, was left to their discretion; and the declaration of their resolution to postpone, however made, was sufficient for the purpose. Three several times they declared that resolution; still holding the residue, as soon as the creditors made a legal demand, they answered to the third condescendence that, “the trustees have *thought it proper, and have resolved to postpone the [* 812] payment and to pay the interest only to Mr. James Chambers for his aliment, as provided by the trust deed;” adding, that, “the interest will be no more than sufficient for the said James Chambers’ aliment.” This, in my view, would have been of itself sufficient to bar the claim of the creditors, but it was followed up by the deed of January more formally setting forth the same resolution, and again by the deed of July, with the same object and effect.

Your Lordships have heard much argument as to the deed of January and its alleged operation in giving James Chambers a right to the benefits of his share without the continuing control of the trustees, who did not reserve in it any power of revocation.

This view would make the deed of July, which uses the unequivocal words, "for his life-rent alimentary use," — not employed in the deed of January, — of no avail as an answer to the respondents' claim. But looking carefully to the terms of the deed of January, although it might have been made more clear, as was that which followed it, I think that its recitals, its statement that the share of James Chambers is not more than "a suitable alimentary provision for himself and his family," and its provision that the interest only should be drawn at such times and in such proportions as the trustees might deem expedient, are conclusive against the reasoning of the respondents. I agree with my noble and learned friend that no technical words are necessary to carry out the designs which, from these passages and the circumstances of the case, we must believe the trustees to have had at heart; and the deed, therefore, seems to me abundantly sufficient, as an exercise of this power, to prevent the operation of the arrestment, even if, as I do not conceive it to have been, any further exercise of it was needful for that purpose after the declaration of their resolution to postpone, which they have made in the pleadings. In this view your Lordships do not require at all to consider this deed of July.

Neither do I think that the delay of making or declaring the resolution until after the institution of proceedings, diminishes its force or affects the rights of the parties. The power of the trustees was to continue until they had actually parted with the shares, and the exercise of it was made necessary by those [* 813] very * proceedings which gave the first occasion for such interference as the settlor had manifestly intended them to make. As the arrestment could not invest the debtor with any interest he had not before, it could not take from the trustees the power rightly or wrongly committed to them and legitimately called into action by the arrestment itself. This view must, I think, have been adopted by the Court below when, by its interlocutor of the 17th of July, 1877, it allowed the amendment of the record which put in issue the two deeds executed after the raising of the action. Without reference to them, however, as I have said, this answer to the third condescendence appears to me sufficient to sustain the appellants' case.

Therefore, my Lords, holding that the intention of the settlor is clear, that this power given to the trustees was ample to carry that

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intention into effect, that their action was within the scope of that power, and that it was validly executed, I am of opinion that the appeal should be allowed, and the interlocutor of the First Division of the Court of Session reversed with costs.

In the view I have taken, it is wholly unnecessary to decide the question raised as to the testing clause of the trust deed, and, therefore, I give no opinion upon it.

LORD BLACKBURN (having stated the facts of the case, proceeded): —

My Lords, the judgment of the Court below was adverse to the opinion entertained by Lord SHAND, who says: —

“ I am unable to concur in the proposed judgment, being of opinion, with the LORD ORDINARY, that the trustees of the late Dr. Chambers are entitled, under the powers conferred by his settlement, to retain the money to which the pursuers, as creditors of Mr. James Chambers, maintain they have acquired right, and to apply the interest or proceeds towards the maintenance of Mr. Chambers and his family. In the view I take of the case it is unnecessary to decide any question as to the effect of the provision in the testing-clause which declares the annuity, legacies, and provisions left by Dr. Chambers to be alimentary (4th Series, vol. v. at p. 119). ”

In this opinion of Lord SHAND I agree: I will, without expressing any opinion as to the effect of the provision in the testing-clause, and treating the deed as if no such provision was there inserted, consider what is the true construction and legal effect of the clause, beginning with the word “ lastly ” (*ante*, p. 477).

* The deceased appointed his trustees “ to hold, apply, [* 814] pay, and convey the residue of his estate to and for the behoof of his children ” (of whom James Chambers was one. His share has now been ascertained to have been somewhat more than £5000) “ with and under the exceptions and modifications after stated, payable ” in the case of such as are majors (which James Chambers was) “ six months after my decease, declaring that the whole provisions in favour of my said children, shall, at my death, vest in those surviving me,” and James Chambers did survive him. Had the deed stopped there it would have been too plain for doubt that the provision for James Chambers was his to dispose of as he would from the time of Dr. Chambers’ death, and

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that as soon as the six months had elapsed he could have compelled the trustees to pay him both principal and interest. But (after some provisions as to children who died in his lifetime leaving issue and minors, which do not affect James Chambers), the truster proceeds to state "the exceptions and modifications" in the following terms:—

"And notwithstanding the periods above appointed for the payment of the shares of the residue of my means and estate, I provide and declare that it shall be lawful to, and in the power and option of my trustees, if they see cause and deem it fit, to postpone, as long as they shall think it expedient to do so, the payment of the provisions or shares of residue hereinbefore provided as aforesaid, in the case of all or any of my children or grandchildren, and to apply the interest or annual produce of the same during the period of postponement to or for behoof of such children or grandchildren; or by a deed under their hands, to retain the said provisions, or any of them, vested in their own persons, or to vest the same in the persons of other trustees (whom they are hereby authorised to appoint), with all or any of the powers, privileges, and exemptions belonging to themselves, including the power of appointing factors, so that my children and grandchildren, or any of them, as the case may be, may draw and receive only the interest or other annual proceeds of their respective provisions during their lives, or for such time as my trustees may fix, and that the capital may be settled on or for behoof of such children or grandchildren, or their lawful issue, on such conditions and under such restrictions and limitations, and for such uses as my trustees, in their discretion, may deem most expedient, of which expediency, and the time and manner of exercising the powers and option hereby given, they shall be the sole and final judges."

My Lords, I shall not occupy time by examining critically the words of this clause, which has been sufficiently done in the Court below. The words are not very artistically chosen, but I think there can be no doubt that the intention of the truster, Dr.

Chambers, was that his trustees should have "a power and [* 815] option * if they see cause and deemed it fit," to postpone the payment of James Chambers' share, and to apply the interest during such postponement to or for behoof of James Chambers.

He probably had two motives, one was that a large part of his

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means being in a business, it might be inconvenient to give his children or their creditors power to insist on the withdrawal of those means from the business at the end of six months from his death, and if the postponement was for that reason only, it would be right to pay the interest of the share to the child. The other motive was, that he feared that his children or some of them might prove spendthrift; in that case the trustees might postpone the payment whilst they were considering whether they would exercise the further power of settling the fee on the issue, and giving the spendthrift child only a life interest. Indeed in any case some time must elapse before such a deed could be prepared, and during that time at least the payment must be postponed. And whilst it was postponed for such a purpose it would not be desirable to pay the income to the spendthrift, but to apply it for his behoof. I think it probable that if the present case had been suggested as a possible one to Dr. Chambers, and he had been asked whether it was his intention that the income should during the postponement be swallowed up by the Stock Exchange creditors, leaving James Chambers and his family penniless, he would have said, "By no means. I have given my trustees discretion to apply it for his behoof, and they will exercise that discretion by paying the household and necessary expenses first before paying anything to either James Chambers or his creditors. If, after doing so, there is anything over, James Chambers and his creditors may do what they like with it." But it was for the trustees and the trustees alone to decide how the discretion was to be executed. The truster declares in the most explicit language that—of the expediency and the time and manner of exercising the powers and option given to his trustees "they shall be the sole and final judges."

My Lords, where a truster gives discretionary powers to be exercised by his trustees, in order to protect the interests of others, the trustees are bound to exercise their discretion, and cannot in general deprive themselves by anticipation of the power to do so; * *Weller v. Ker*, L. R. 1 H. L. Sc. 11. In the [* 816] present case, however, the terms of the trust are such that the trustees might properly pay the whole or part of the share at the end of six months or any subsequent period; and they in fact did pay a part, and as to that part their discretionary power was gone. It was argued at your Lordships' bar that the

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trustees must either retain and settle the whole fund, or none. No doubt there may be and often is a trust where from the nature of the subject-matter and the objects of the trust, or otherwise, it appears to be the intention of the truster that the whole shall be kept together as one entire thing. But here the fund is in its nature divisible, and the objects of the trust are such as to show that it is divisible. I think, therefore, that as against James Chambers, the trustees had power to exercise their discretion as to the postponement of the payment of any part of the fund which remained in their hands at any time up to actual payment.

The truster no doubt has declared that the shares of James Chambers should vest on the trustee's death; but "with and under the exceptions and modifications to be afterwards stated." It is judicious, and is common, both in Scotland and in England, to vest a fund subject to be divested on after events, rather than to keep it unvested and contingent till those events happen. Familiar instances are referred to by Lord SHAND, as money settled, subject to the life interest of the parents, on the children of a marriage born or to be born, or subject to a power. The interest of each child vests on birth, but is subject to be divested in part by the birth of more children, or in the whole by the exercise of the power.

I do not understand any of the Judges below to say that if there had been no arrestment in this case and James Chambers himself had taken proceedings to compel the trustees to pay over the principal to him, the trustees would not have had a good answer. Lord DEAS seems to admit, or at least does not deny, that the deed of the 10th of January, 1877, would have been good if *tempestive* executed: but to hold it too late after arrestment. And the LORD PRESIDENT expressly says (Scotch Cases, 4th Series, vol. v. at p. 127):—

"The sole question, therefore, is, — How far is the effect of this clause taken off or modified by what follows? It would [817] be strange if the effect of that modification * were that in certain events the shares should not vest at death. That would simply undo what has immediately preceded, and that, in my opinion, is not the effect of the modification. But it is quite possible that a provision may vest and yet in certain events be subject to defeasance. An entailed estate, for instance, may vest fully in an heir of entail, and yet be subject to defeasance. There

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have been instances of that in cases that have recently come before this Court; and if this is possible in the case of an entailed estate, it may certainly take place in other deeds of settlement made with that purpose. If the clauses that follow are resolute and not suspensive, vesting takes place as fully and completely as if there had been no conditions appended. What is the effect of the conditions and exceptions that follow. As regards the first part of them, they are neither concerned with vesting nor divesting. They merely deal with the term at which the provisions are to be payable, and if there had been here a postponement of payment by the trustees in virtue of that power, the effect would be, not certainly to make this arrestment bad, but that the right of the arresting creditors to make their arrestment effectual would have been postponed.

“Passing over that clause, we come to a clause empowering the trustees to create new trustees or to constitute themselves new trustees, to provide that the beneficiaries are not to be entitled to more than the life-rent of the provisions, and that the capital is to be settled on their children ‘on such conditions and under such restrictions and limitations, and for such uses as my trustees in their discretion may deem most expedient.’ Now, I quite admit that the effect of the deed which the trustees have executed is to divest the legatee of the right as it then stood vested in him. This deed applies and makes effectual the resolute condition; it resolves the right in the manner contemplated by the truster; but till it was executed the fee of his share of the residue remained vested in the beneficiaries *just as if no such condition existed*. From that it follows that the fee existed in the legatee, subject to the diligence of his creditors at the date of the arrestments; and on that simple ground I hold that the deed executed by the trustees had no effect on the arrestment previously used by the creditors.”

My Lords, I agree with all of this except the seven words which I have emphasised. With deference to the LORD PRESIDENT, he has overlooked the great and fundamental difference between a gift to one, either direct or through the medium of trustees, who are mere conduit pipes to convey the gift to the beneficiary, and a gift subject to a power reserved to trustees to be exercised paramount to the beneficiary and in his despite. I think the arrestment fixes the date at which it is to be determined whether the

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arresters have a right to attach the fund, and anything that is subsequently done by the debtor, or by those who have rights against the debtor, or by those who claim under him, comes too late after that. But a divesting of the debtor's vested property, by something quite independent of him, is different. If a fund were given to the children born or to be born of A., and the [* 818] creditors of a person, who at the * time was the only child of A., arrested the fund, the birth of a second child of A. would not come too late to divest one half of the fund. Why? because as I think the fund did not remain vested in the only child, just as if no such condition existed, but did remain in him subject to that condition. And I think that the truster, having a perfect right to give his son James nothing, had also a perfect right to give him a vested interest in a fund, subject to a condition that the trustees might in their discretion divest that fund; in this I agree with the LORD ORDINARY (Lord YOUNG) and Lord SHAND. Whether the truster has by the terms of this deed effectually exercised that right, is a question depending on the construction of the instrument. I think he has.

An ingenious argument which had not been thought of in the Court below was stated at your Lordships' bar. It was said that the trustees had executed a deed of the 10th of January, without any power of revocation reserved, which they could not afterwards alter; and it was said that, whatever might be their wish, the terms of that deed were such that on its true construction they had irrevocably given James Chambers an absolute right to draw and receive the interest during his life, and spend it as he pleased; and consequently the arresters were entitled to do so for their benefit. But I do not think this is the true construction of the deed of the 10th of January. The whole narrative shows an anxious desire to secure that the income, which, it is stated, is not more than is required as a suitable alimentary provision for James Chambers and his family, should be so applied. And the final clause that "So long as the said provision shall be retained as aforesaid, the said James Chambers or his children or issue shall only be entitled to draw and receive the interest, or other annual proceeds, of the said balance of his provision during his and their lives," on which alone the argument rests, is followed by the words, "And that at such times and in such proportions as we may deem expedient."

Nos. 12, 13. — Jones v. Winwood; Chambers v. Smith. — Notes.

There is no rule requiring that any special terms of art such as alimentary should be used, and though the deed might have been more clearly framed, I think the intention to reserve to the trustees a power to control the purposes for which the income was to be spent sufficiently appears; and under the very extensive powers given to them by the truster the trustees had power to do so as far * as James Chambers was concerned. What may [* 819] be the effect as to his children after his death may be settled then.

My Lords, if this view is adopted by your Lordships, it becomes unnecessary to decide whether the proviso inserted in the testing clause is effectual.

Should it in any future case become material, those who have to decide the question must say whether the very powerful reasoning of Lord DEAS, agreed to by all the other Judges, is consistent with the *ratio decidendi* of this House in *Dunlop v. Greenlees* (June 2, 1865), 3 Macph. 46. I wish to say nothing to bias the decision of that either one way or the other.

I entirely agree in the proposed judgment.

Lord GORDON, after minutely criticising the judgments pronounced in the Court below, and referring at length to the cases of *Ker's Trustees v. Weller* (appeal *Weller v. Ker*, L. R. 1 H. L. Sc.) and *Dunlop v. Greenlees* (3 Macph. H. L. 46), expressed his concurrence in the opinion that the judgment [830] pronounced by the First Division of the Court of Session should be reversed, with costs.

Judgment of the House: — Ordered and adjudged, that the said interlocutor of the Lords of Session in Scotland, of the First Division, of the 9th (signed 10th) of November, 1877, complained of in the said appeal be, and the same is hereby reversed; and that the defenders (appellants) be assoilzied from the conclusions of the action with expenses; that the said respondents do pay to the appellants the costs incurred by them in respect of the appeal.

Lords' Journals, April 15, 1878.

ENGLISH NOTES.

In connection with this topic should be mentioned the 6th section of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), which is as follows:

 No. 14. — *White v. St. Barbe.* — Rule.

“(1) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power; and after disclaimer, shall not be capable of exercising or joining in the exercise of the power. (2) On such disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power. (3) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.”

AMERICAN NOTES.

So far as the execution of a power would operate to defeat an estate which the donee has for a valuable consideration created out of his own estate or interest, it will not be valid. See 2 Washburn on Real Property, *308-312; 4 Kent's Commentaries, *346.

But so long as nothing is done in derogation of the alienee's estate, an alienation by the donee of a power has no effect on the power. The donee can still exercise the power, provided he does not derogate from his previous grant. *Leggett v. Doremus*, 25 New Jersey Eq. 122.

A power appendant or in gross may be released by the donee. *Norris v. Thomson*, 19 New Jersey Eq. 307; *Grosvenor v. Bowen*, 15 Rhode Island, 549; *Atkinson v. Dowling*, 33 South Carolina, 414.

Not so a power simply collateral. In *Norris v. Thomson*, *supra*, the Court said: “It is a settled rule that where a life interest or other estate is given to the person who is authorized to devise or appoint the property, the person authorized to appoint can release and extinguish the power. This is called a power in gross. But where the power to appoint is given to one who has no estate or interest in the property to be distributed, which is called a power simply collateral, the person intrusted with the power cannot release or extinguish it, but may exercise it notwithstanding any agreement to the contrary.”

 No. 14. — *WHITE v. ST. BARBE.*

(1813.)

RULE.

A POWER to appoint among children may be exercised in favour of grandchildren by a single deed executed by the donee of the power with concurrence of the child who is the parent of the grandchildren.

 No. 14. — *White v. St. Barbe*, 1 Ves. & Bea. 399, 400.

White v. St. Barbe.

1 Vesey & Beames, 399-406 (12 R. R. 246).

Power. — Appointment to Children. — Exercise to appoint to Grandchildren with Consent of Child.

Under a power to appoint among children interests may be given to [399] grandchildren by way of settlement with the concurrence of their mother, an object of the power, and her husband.

Alexander St. Barbe by his will, dated the 2nd of July, 1797, disposed of his property in the following manner:

"All moneys and property belonging to me I give to my wife, Mrs. Christian St. Barbe, in trust for her to dispose of to our children, and whenever she may judge most proper for their interest: she may, if she thinks proper, keep the whole for her life, and then leave it to our children; and she may make distinctions in leaving more to one than the other, if she pleases, in order to make them behave well: but the whole of the property must be given into the family; except I give all the household goods, plate, linen, and china to Mrs. St. Barbe for her to do with as she pleases, and as her sole property."

The testator died in 1799, leaving three daughters: Elizabeth Fielder, Catherine Randolph, and Christian White. Mrs. St. Barbe, having advanced portions to each of her daughters out of the testator's residuary estate, there remained, after those advances, £4875 Three Per Cent Bank Annuities, and £1561 3s. 7d. Five Per Cent Navy Annuities.

By a deed of appointment, dated the 28th of June, 1806, reciting that Christian St. Barbe was desirous, and had agreed, in exercise of her power under the will of her husband to appoint the £4875 Three Per Cents and £1000 (part of £1561 5s. 7d.)

Navy Annuities, expectant * on her own decease, in favour, [* 400] and for the benefit, of Christian White; and that it had been agreed, and especially by Charles Henry White and Christian, his wife, that the funds so to be appointed should be settled upon the trusts therein mentioned for the several benefits of Christian White and her children; and that, in order to declare and secure the respective interests of Christian White and her children, in such funds, Christian St. Barbe should forthwith transfer them

No. 14. — *White v. St. Barbe*, 1 Ves. & Bea. 400, 401.

into the names of the trustees, in pursuance of that agreement Christian St. Barbe covenanted with the trustees at the request and by the direction of White and his wife, that she would transfer the £4875 and £1000 stock into the names of the trustees: and it was declared, and Christian St. Barbe did by such direction as aforesaid in exercise of her power under the will and all other powers enabling her thereto appoint, that they should settle the said stock, when transferred to them, upon the following trusts: in trust, as to the dividends and annual produce, for Christian St. Barbe for life; and after her decease, as to the same dividends and produce, unto Christian White for life, and after the decease of the survivor, in trust as to the principal sums of £4875 and £1000 stock for all and every the children of Charles Henry White, and Christian his wife, then born and thereafter to be born equally; and to an only child, if but one.

Shortly after execution of this appointment Christian St. Barbe transferred the stock according to her covenant. Soon afterwards in the same year Christian White died, leaving two daughters, the plaintiffs, her only children. Her husband took out administration to her.

By another indenture, dated the 22nd of October, 1806, [* 401] reciting the appointment of the 28th of June, it is * witnessed, that for declaring and giving effect to such of the trusts and purposes of the deed of appointment as were still subsisting or capable of taking effect, and for providing for the event of the failure of all such trusts and purposes, the trustees should stand possessed of the £4875 and £1000 stock, upon trust, as to the interest, for Christian St. Barbe for life, and, after her death, to pay the principal between the plaintiffs Eleanor St. Barbe White and Christiana St. Barbe White, the only children of Charles Henry White by Christian his wife, in equal shares and proportions, to vest at twenty-one or marriage with benefit of survivorship, and in case neither of them should attain twenty-one, or be married, then to re-transfer all such stock to Christian St. Barbe, her executors, administrators, or assigns.

Elizabeth Fielder died in 1808; and Catherine in 1809. The bill prayed, that the £4875 and £1000 stock might be transferred into the name of the Accountant-General, upon the trusts of the appointment, and properly secured for the benefit of the plaintiffs, subject to Christian St. Barbe's life interest; and that the trustees

might be restrained from transferring the stock without the direction of the Court.

The answers insisted that the power given by the testator's will was confined in its objects to his children: that under the will his three daughters took vested interests, subject to their mother's power to vary the amount of their shares; but, as the mother made no appointment to them in their life-time, she had no power to make any appointment after their deaths; that the power did not extend to grandchildren; and the stock was unappointed: the defendant Randolph insisting, that it was a joint-tenancy in the three daughters; and, as his wife had survived her two sisters, the whole * became vested in her; and he, as her [*402] administrator, was entitled to it.

Sir Samuel Romilly and Mr. Roupell, for the plaintiffs:—

If the power is not well executed, there is clearly a tenancy in common among the daughters. This will be compared to the case of appointments by will; which are certainly void for the excess beyond the power; for instance as to interests given to grandchildren under a power to appoint to children: grandchildren not being objects of the power: *Alexander v. Alexander*, 2 Ves. 640 (p. 415, *ante*); but this question has been decided in *Langston v. Blackmore*, Amb. 289; and in *Alexander v. Alexander*, the MASTER OF THE ROLLS speaks to the same effect (2 Ves. 642): “The mother had a power to do something similar to this, but in another way; for though that power would have enabled her for better advancement in marriage to make a strict settlement, that is implicitly contained in that power to limit any share she thought fit to give for advancement of marriage in that way; but she has not taken that method: for she has made a disposition of it by her will; and therefore it must correspond with every circumstance in that will.”

This question was also clearly decided in *Routledge v. Dorril*, 2 Ves. Jun. 357, 362, where Lord ALVANLEY states as to the appointment, made on the marriage of Elizabeth Dorril, that where there is a power to appoint among persons, capable of such appointment, and they come *in esse* at the particular times to make the appointment good, a sum appointed, as in that case to the daughter, upon marriage, though modified with respect to the objects of

* the marriage is a good appointment, not to the objects of [*403] the marriage, but to the daughter herself; and that appointment was held a good appointment to her: though, if it had

No. 14. — *White v. St. Barbe*, 1 Ves. & Bea. 403, 404.

been done by will, and independent of any modification, introduced by Elizabeth, the daughter, it would not have been good; as the husband, and the children of the marriage born after the death of their grandmother, were not immediate objects of the appointment. Therefore it was just as if it was appointed to her, and she had settled it so with the husband.

That was precisely as Lord HARDWICKE considered it in *Langston v. Blackmore*; but that was not, as *Routledge v. Dorril*, the case of a marriage then in contemplation, but a provision for any wife the son might afterwards marry, and children by a subsequent marriage. This therefore will be supported as an appointment, not to the grandchildren, but to Mrs. White herself: the intention in her favour appearing upon the deed: and her children taking, not by direct appointment, but under a modification of the property, letting them in, with the consent of their mother, an immediate object of the power. That certainly could not be done by will, as is observed in *Alexander v. Alexander*; as that would be the sole act of the person having the power; and the interest would be taken directly under the appointment by persons, not objects of it: but, where it is done by deed, the immediate object joining in the act, and directing the uses, all objection is removed. From the cases that have been cited, Mr Sugden (*Sugden on Powers*, 420) draws the same conclusion, that in equity a valid appointment may be made to persons, not objects of the power, with the approbation of the real object; and, though the instance

he puts of such a settlement upon the marriage of a child [*404] is not applicable to this case, * Mrs. White having been married before this appointment, the case of *Langston v. Blackmore*, which was upon a settlement not in contemplation of marriage, shows there is no such distinction. This will therefore be sustained as an appointment substantially to the daughter, a proper object of the power, who, if the appointment had been made directly to her, might the next day with her husband have made this settlement.

Upon the construction of the will, however, it is not to be conceded that children only are the objects of this power: the word "family" extending to all issue.

Mr. Richards, for defendant, the father of the plaintiffs, who, as administrator of his deceased wife, had an interest against them, but who had joined in the appointment, declined arguing the case.

No. 14. — *White v. St. Barbe*, 1 Ves. & Bea. 404, 405.

Mr. Leach, and Mr. Horne, for the defendant Randolph: —

This is clearly a power to appoint among children. The conclusion attempted to be drawn from the accidental introduction of the vague word "family" supposes a change of intention, before the testator came to the end of the will, clearly in the former part pointing to children, to which the word "family," as here used, must be considered synonymous; and the Court will not imply contradiction from expressions that may be reconciled.

As to the second question, whether this is to be considered as an appointment to a child, or to grandchildren, the principle of the cases cited is, that the appointment was a direct gift to the child, who was competent to make that settlement, carving out of it an interest for *the children of that child. [*405] The distinction of this case is, that the daughter had not the capacity of making a settlement; as this was, not a present interest, which she and her husband might have settled, but an interest in remainder, expectant on the death of her mother, which they were not competent to deal with. The author of this power expresses his object, personal to the children, to secure their good behaviour; and the Court will not without clear words extend it beyond the reason assigned. The interests are vested, subject to be divested by a proper appointment; and this instrument cannot be separated, taking it first as an appointment, and secondly as a declaration of trust.

Sir Samuel Romilly, in reply, observed, that this was just such a settlement as the Court would have directed; and, though, it is true, the wife had not the power of making such a settlement, if an appointment had been made to her, the husband could have done it.

The MASTER OF THE ROLLS (preventing farther reply): —

The last argument, that the appointment and settlement was all one act, and could not be separated by considering it first as a good appointment, and secondly, a declaration of trust, would have applied equally in the cases cited; for there was no direct appointment to the child, and afterwards a settlement: but it was one act, putting the whole into settlement at once by consent of all the parties.

Why could not the husband in this case make the settlement? A husband can dispose of such property of his wife in expectancy against every one but the wife surviving; and this is just such a

 No. 14. — *White v. St. Barbe*, 1 Ves. & Bea. 405, 406. — Notes.

settlement as the Court would have directed. The question is, whether all parties, * having any power over the fund, have not concurred in this disposition of it. The wife could make the appointment; and the husband could make the settlement; and he is a party to the deed. It falls precisely within the principle of *Routledge v. Dorrit* and *Langston v. Blackmore*.

The decree was made according to the prayer of the bill.

ENGLISH NOTES.

The principle is thus laid down in Sugden on Powers, ch. 16, s. 1, §§ 18, 21: "It is settled that in equity a valid appointment may be made to persons not objects of the power, with the approbation of the real object of the power. Therefore if upon the marriage of a child, the parent of the marriage settlement, under a power to appoint to children, appoint to the issue of the marriage, the appointment would be supported in equity, not as a good appointment to the issue of the marriage, but as an appointment to the child himself, and a settlement of it by him; nor is it essential that such a settlement should be made upon marriage. The principle is, that the act operates, first, as an appointment; and, secondly, as a settlement by the appointee. Therefore an appointment of personalty to the children of a married daughter, who is herself the object of the power, is valid if made with the concurrence of the husband (citing the principal case), for a husband can dispose of such property of his wife in expectancy, against every one but the wife surviving. . . . And a settlement on a child and her husband, and their issue, in strict settlement, was supported in equity, as the child was an assenting party to the settlement, although the power was confined to children; and so far from the power being referred to, the donee (who was the original settlor) recited that he was seized in fee, and conveyed as owner, and there was no evidence that the child was aware of the existence of the power. This is the case of *Wade v. Papet* (1 Bro. C. C. 364), and, strong as the circumstances are, the decision, in the absence of fraud, seems to be right."

The same principle was followed by the Irish Court of Chancery in *Irvine v. Irvine* (1859), 10 Ir. Ch. 29, where the above passage in Lord St. Leonard's book was cited in the judgment.

The principle is again treated as settled law in the case of *Daniel v. Ackwright* (1864), 2 H. & M. 95, 101. In the same case a similar settlement upon a married daughter to which she was not made a party was held bad so far as relates to the interests thereby given to the husband and children of the child; but in the circumstances there was held to be sufficient ground for rectifying the settlement so as to make it an appointment to the daughter absolutely.

No. 16. — M'Queen v. Farquhar. — Rule.

No. 15. — WHISTLER v. WEBSTER.

(1794.)

RULE.

WHERE the donee of a power makes an appointment giving a benefit to a stranger to the power, and also to a person who is entitled in default of appointment, the latter person is put to his election whether he will take under the appointment or by default of appointment.

Whistler v. Webster.

2 Ves. Jr. 367-372 (2 R. R. 260).

[This case will be found reported as No. 2 of "Election (Equitable Doctrine of)," 10 R. C. 316.]

ENGLISH NOTES.

It will be seen that the rule is only a modification of the ordinary principle of election which takes place where a donor gives a benefit to A. by the same instrument which also purports and intends to give away to B. something which is A.'s own.

The cases of *In re Brooksbank*, *Beauclerk v. James* (1886), 34 Ch. D. 160, 56 L. J. Ch. 82, 55 L. T. 593, 35 W. R. 101, and *In re Wheatley*, *Smith v. Spence* (1884), 27 Ch. D. 606, 54 L. J. Ch. 201, 51 L. T. 681, 33 W. R. 275, cited in the notes 10 R. C. 323, are illustrations of the principle applied to powers.

No. 16. — M'QUEEN v. FARQUHAR.

(1805.)

No. 17. — CUNINGHAME v. ANSTRUTHER.

(H. L. SC. 1872.)

RULE.

WHERE a power of appointment is given to one person for the benefit of another class of persons, any transaction between the donee of the power and the beneficiaries in

No. 16. — *M'Queen v. Farquhar*, 11 Vesey, 467.

pursuance of which the donee of the power is to exercise the appointment for his own benefit, will vitiate such an appointment: but, where the transaction does not appear upon the title, the Court will not act upon a mere suspicion, especially where a purchaser for value is concerned.

Where a father, in exercising a power of appointment to children, makes an appointment expressed to be in discharge of any rights which they have against the father's estate, this will be treated as an unconditional appointment *pro tanto* of the fund.

M'Queen v. Farquhar.

11 Vesey, 467-482 (8 R. R. 212).

Power. — Exercise in Fraud of Power. — Suspicion not enough.

[467] Though a party is not permitted to execute a power for his own benefit, and the objection cannot be waived by a party participating in the benefit, as against other interests, the Court will not act against the title upon a mere suspicion, that a transaction was of that nature; appearing fair both upon the instruments and the abstract: viz. a purchase under the execution of a power of appointment by a father, subject to estates for life in him and his wife, in favour of their son; all three joining, and receiving the money, the fair value, which is presumed to be received according to their interests in the estate, and the purchaser not bound to see to the application.

Power of appointment by deed, to be signed and sealed in the presence of witnesses. The attestation applying only to sealing and delivery, though the deed purported to be signed, sealed, and executed, it was presumed that the signature was in the presence of the witnesses.

Mere suspicion, upon opinions in the abstract, &c., will not support an objection by a purchaser.

Power of sale not well executed by a partition.

The objection by a purchaser applying only to a small part of the estate, a specific performance decreed with compensation.

The bill prayed the specific performance of an agreement for the sale of the estate of High Cannons, Herts, by the plaintiff to the defendant, for £14,175, which was resisted upon different objections to the title, the plaintiff also insisting that all objection was waived by the defendant having immediately after the sale attempted to re-sell the estate by auction; at which sale it was bought in, and thereby a future sale was prejudiced. By a decree, pronounced at the Rolls, a reference to the Master as to the title

No. 16. — *M'Queen v. Farquhar*, 11 Vesey, 467-469.

was directed. The Master's report was in favour of the title, except as to a small part, a little exceeding six acres; which part the report stated not to be material to the possession and enjoyment of the estate, and that £500 would be a proper compensation in respect of it.

The case came before the Court on exceptions to the report.

The objections to the title as to the principal part of [* 468] the estate stood upon the following instruments and circumstances:—

By indentures, dated the 8th of July, 1747, the manor and estate of Cannons were settled to the use of William Abney for life without impeachment of waste; remainder to the use of Catherine his wife for life in the same manner; remainder to trustees to preserve contingent remainders; remainder to the use of all and every, or such one or more of the children of William and Catherine Abney, and in such parts and proportions, manner and form, and subject to such charge or charges for the benefit of any such child or children, and with or without power of revocation, as William Abney by any deed or deeds, writing or writings, to be by him signed and sealed in the presence of two or more witnesses, or by his last will and testament, attested by three or more credible witnesses, shall direct or appoint; and, until such direction or appointment, to the use of all and every the children, equally to be divided between them, share and share alike, as tenants in common, and not as joint-tenants, and the several and respective heirs of their bodies, with survivorship, if one or more die without issue, and for want of such issue, to the use of the heirs of the body of Catherine; remainder to the heirs and assigns of William Abney.

This deed contained a proviso, that it shall be lawful for Abney and his wife during their joint lives, and for the survivor, by any deed or deeds, writing or writings, to be by them or the survivor sealed and delivered in the presence of two or more credible witnesses, to revoke and make void all and every the uses and estates before limited; and to limit to two trustees, upon trust that they shall with all convenient speed after *creating such [* 469] trust by direction of Abney and his wife, or the survivor, in writing, sell and convey the premises; and upon farther trust, that the trustees shall with all convenient speed by direction of

Abney and his wife, or the survivor, or the executors or administrators of the survivor, lay out the money to be raised by such sale in the purchase of freehold estates, and settle the same to the same uses, or such as shall be capable of taking effect (except the power of revocation and trust to sell), and until the purchase with consent, &c., to lay out the money upon real or government securities.

The deed contained another power for Abney and his wife, or the survivor, by any deed or deeds, writing or writings by them or the survivor, signed and sealed in the presence of two or more credible witnesses, to revoke or alter all or any of the said uses, before limited, of the premises or any part thereof, and by the same deed or deeds, &c., or any other, to declare any new or other uses of the same, or so much whereof such revocation or alteration shall be made, as they or the survivor shall think fit.

By indentures, dated the 3rd of March, 1748, Abney and his wife under the powers limited to them revoked all the uses, and appointed all the premises to the same uses, except the last power to revoke the uses, and limit new uses.

By indentures, dated the 15th of July, 1771, reciting the above instruments, and that William Abney and his wife had Robert their eldest son, and five other children, it was declared, that in consideration of natural love and affection which William Abney had for Robert Abney, his eldest son and heir apparent, and in performance of a promise and agreement made by the said [*470] William Abney unto *and with the said Robert Abney, and for other good causes and considerations, William Abney, by force of all and every or any of the powers limited to him, did by the said deed by him signed, sealed, and executed, in the presence of three credible witnesses, declare, direct, settle, limit, and appoint, all the said manor of Cannons, &c., from the determination of the estates for life, limited to him and his wife and the survivor, and subject thereto, unto and to the use of Robert Abney, his heirs and assigns forever.

By indentures of lease and release, dated the 30th and 31st of August, 1771, reciting the above deeds and an agreement for a sale, it is witnessed, that in consideration of £8000 paid to William Abney and Catherine his wife, and Robert Abney, by Robert Cotton Trefusis, William and Catherine Abney did grant, bargain, sell, release, direct, limit, and appoint, and Robert Abney did

No. 16. — *M^{rs} Queen v. Farquhar*, 11 Vesey, 470-478.

grant, bargain, sell, release, ratify, and confirm unto Trefusis and his heirs, the manor of Cannons, &c., to the use of Trefusis, his heirs and assigns, with covenant to levy a fine, which was levied accordingly.

The principal objection taken upon these instruments [471] was, that the appointment by William Abney in favour of his son Robert appeared to have been made under a previous agreement between them; and if the father derived any benefit from that agreement, which seemed probable, or even made a previous stipulation * that his son should join him in a [* 472] sale, which there appeared the strongest reason to apprehend, it would have been a fraudulent execution of the power.

* The LORD CHANCELLOR, after adverting to certain [* 474] objections, not within the scope of the above rule, proceeded as follows:—

Another question of immense importance is, whether the [478] power given by the settlement of 1747 is ill executed, upon the ground of such suspicion as may arise upon the circumstances appearing on the face of the instrument, or those disclosed in the abstract, coupled with the probability that the same circumstances in the body of the abstract, not upon the face of the instrument, were disclosed to the persons through whom the title had gone. I mention that, as, if the intermediate persons had not notice, this person, though he had notice, would have the benefit of that. Upon the face of the instrument the power is given to a person who is tenant for life, with remainder to his wife for life, to limit the reversion after their lives to such one or more of the children, as he should think proper; and upon the face of the instruments it appears he did by a deed dated the 15th of July, 1771, reciting the indentures of 1747, and a fine levied, in consideration of natural love and affection, and in performance of a promise and agreement made by him unto and with his son, and for other good causes and considerations, appoint the reversion to his eldest son, his heirs and assigns forever. By other deeds, dated the 30th and 31st of August, in pursuance of a contract for the sale of the estate in consideration of £8000, stated to be paid to the husband, wife, and son, they convey to the use of Trefusis, with a covenant to levy a fine; and a fine was levied.

No. 16. — *M'Queen v. Farquhar*, 11 Vesey, 479, 480.

[* 479] * It is clear, if nothing appeared but that the father and mother, seised for their lives with such a power, appointed in favour of their son in fee, and afterwards by a transaction separate from, or connected with, the transaction of the power, supposing their intention had been to give the entire benefit of the reversion to their eldest son after such appointment, either by previous or subsequent contract, to which the son was a party, they had sold the estate for £8000, the full value, and upon the face of the instruments that money appeared to have been paid to the three, in law and equity that would have been a payment to them according to the interests they had in the estate; and the purchaser would be safe, as the money got home to the three persons entitled; and how they disposed of it afterwards as to their respective interests was not of any importance to him.

But it is stated that if a person executes a power for his own benefit, that is an objection that cannot be waived by a person participating in the benefit arising from that transaction; and therefore the circumstance that the eldest son waives the objection is not sufficient if the younger children are discontented; for they are entitled to the benefit of the settlement, unless the interest vested in them has been dislodged and divested. It is truly said this Court will not permit a party to execute a power for his own benefit. In *Lord Sandwich's case* a father, having a power of appointment, and thinking one of his children was in a consumption, appointed in favour of that child; and the Court was of opinion that the purpose was to take the chance of getting the money as administrator of that child. To bring this case within that, it is said if there is any ground for suspicion that the execution

of the power was for the benefit of the party executing, the Court must act upon * it as a judicial suspicion.

I am extremely apprehensive, I should make great havoc in many considerable titles by adopting that principle: for upon the cases to which I allude it is extremely familiar that a person having a settled estate and an unsettled estate executes his power in order to acquire the fee of the former, giving to the uses of the settlement the fee of the unsettled estate; and the Court would go a great way, and would make great havoc among titles by holding that afterwards, at a considerable distance of time, or immediately (for there must be regard to the intervening circumstances); as such a transaction took place between parties, who might take improper

advantages in their dealings upon the estate, they must prove that they did not.

If there is not sufficient upon the face of the instruments to shake the title, what is there upon the face of the abstract, supposing all the purchasers had notice, beyond what appears upon the face of the instruments, to authorise this Court to say this power is not well executed in law; or, if it is, that it is not well executed in equity? The few circumstances are these. Abney, the father, entered into a contract with Trefusis for the sale of the estate to him; previous certainly to the execution of these instruments, which shows an inconsistency in the recital, stating the contract to be with the father and son, unless there was a subsequent contract. He states, in a case for the opinion of Mr. Duane, that he had entered into a contract. The opinion was, that a title could not be made unless an appointment was executed to the son of age. The father does make that appointment. It does not appear that the estate sold for less than its value; that the son got less than the value of his reversionary interest. But the estate becoming his absolutely by the appointment, he, by an instrument affected by nothing but the contents of it as the owner of the reversion, * accedes to the purchase, conveys with his father and [*481] mother, in consideration of £8000, and the parties, taking the conveyance, pay the money to the father, the mother, and the son, to be dealt with according to their respective interests; that is, according to their rights in the land; and though the contract with Trefusis was only to substitute money for the estate, there was nothing to show that the son was not to receive a due proportion of the money when the contract was afterwards executed by the deed, in which he joins, and with his father and mother receives all the money. Upon the question, therefore, whether those possibilities and probabilities are sufficiently evidenced by anything to show that this is not a good title, my opinion is that it is a good title. I say nothing as to what is to be done upon that; whether it is such a title as the Court will according to its present course compel a purchaser to take. I will hear that argued.

After argument upon the costs:—

The LORD CHANCELLOR:—

[482]

I am firmly of opinion that the title to the legal estate,

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attending to all that could be known from the abstract, is a good title, and such as a purchaser must accept; for I should very reluctantly lay down that notice from opinions in an abstract, or anything that appears upon a deed, that there may by possibility be reason to suspect what I cannot know, and may not be true, that the title is bad is such a notice as would affect a purchaser. The vendors were right to abstain from making applications to the younger children. It was not the duty of the vendors to take steps to bring the title into question.

As to the costs, if the question was no more than a question of title, I should act hardly by the defendant by not giving the title the credit of making him pay the costs; for it would help the title. But I shall give no costs: the plaintiff having contended, on a grave ground, but unsuccessfully upon the evidence, that the acts done in putting up the estate to sale again amounted to an acceptance of the title, at least as to all except the six acres.

The exceptions were disposed of accordingly, and the decree made for a specific performance of the contract without costs.

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L. R. 2 H. L. Sc. 223-243.

Marriage Settlement. — Power of Appointment. — Express Reference to the Power unnecessary. — Appointments from time to time authorised by Power of Division.

[223] Where a father was, by his marriage settlement, empowered to divide at discretion the funds in which the children had an expectant interest:

Held, that he could not deal or negotiate with them in executing the power.

Per the LORD CHANCELLOR. — A parent in such a case purchasing the interests of the children, one of them being only eighteen years of age, is a transaction wholly inconsistent with that protection which the law of every civilised country affords to children: and would not be permitted without the fullest evidence of an intention authorising it.

Held, reversing the decree below, that releases or discharges granted by the children to the father, in consideration of money payments made by him, formed no bar to their subsequent claims under the settlement, — such releases or discharges notwithstanding.

Per LORD CHELMSFORD. — The donee of a power may execute it without referring to it, and without taking the slightest notice of it, provided the intention to execute the power really appears.

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The power may be exercised from time to time by several appointments, to suit convenience and promote advantage, as exigencies arise, or as expediency may suggest.

Per Lord WESTBURY. — Some of the learned Judges of the Court below seem to have thought that the power required an execution *uno flatu*, once for all. If that were so, no appointment to a child, though settled in life, could take place until all the other children, objects of the power, had attained maturity.

By ante-nuptial contract of marriage, dated the 26th of March, 1828, between James Anstruther, W. S., and Miss Marian Anstruther, daughter of Sir John Anstruther, of Anstruther, Bart., £4000, contributed by the intended husband, and all the property then *belonging to the intended wife, or which [*224] she might acquire during the marriage, were settled upon them “in conjunct fee and life-rent, and on the children of the marriage in fee,” — the deed declaring that, in the event of there being two or more children, the father, or the mother, if she survived him, should have power to divide and apportion among them the £4000; while with respect to the wife’s property, a similar power of distribution was conferred on the parents jointly or the survivor of them; and it was provided that, failing such division, the children should take share and share alike in full satisfaction of *legitim*.¹

At the date of the marriage Miss Anstruther had £8000, and she afterwards unexpectedly succeeded to upwards of £50,000 on the death of her nephew, Sir John Anstruther, Bart. The clause as to her property specially declared that “it should be in the power of the spouses jointly, and the survivor of them, at any time of their lives, or even on death-bed, to divide and proportion the same among the said children as they should think proper.”

There were three children, all daughters, the sole issue of this marriage, namely, Mrs. Smith Cuninghame, Mrs. Mercer, and Miss Lucy Anstruther.

Mrs. Smith Cuninghame’s marriage took place in 1847, when she was but eighteen years of age; her father and mother (Mr. and Mrs. (Anstruther) being parties to the ante-nuptial contract, and paying £5000 upon trust for the benefit of Mr. and Mrs. Smith Cuninghame and their children, there being a declaration in the deed that Mrs. Smith Cuninghame accepted the £5000 not only in satisfaction of *legitim*, but also in satisfaction of all claims that might be open to her under her parents’ marriage settlement of 1828.

¹ See Lord CHELMSFORD’s opinion, *infra*, where the clauses are fully set out.

In 1859 Mrs. Anstruther died, survived by her husband. In 1861 their second daughter, Mrs. Mercer, married Mr. Mercer; and on that occasion Mr. Anstruther paid the trustees £5000, the marriage contract containing a declaration by Mrs. Mercer similar to that of her sister (Mrs. Smith Cuninghame), that the said sum of £5000 was accepted by her in satisfaction not only of *legitim*, but also of all claims under the marriage settlement of 1828.

Having thus seen his two elder daughters disposed of [*227] in matrimony, *Mr. Anstruther selected to be his own second wife Miss Anderson, whom he married on the 11th of October, 1866, having previously, on the 8th of that month, executed a trust disposition and settlement, the first purpose of which was, "to pay over or invest £20,000 for the sole use and benefit of his youngest daughter Lucy, declaring that the amount should be in full satisfaction of *legitim*, and of all claims under the settlement of 1828. This deed was signed by Miss Lucy in token of her acquiescence. The second purpose of the deed was expressed by a direction to the trustees, "to hold and invest £30,000 " for the benefit of Mr. Anstruther's second wife, to pay her the interest thereof for her life if she should survive him, and after her death for the benefit of the children "to be procreated of the intended marriage," whom failing, to the husband's own nearest heirs and assignees.

Seven months after his second marriage Mr. Anstruther died, survived by his second wife. There has been no issue of their marriage.

On the 31st of December, 1867, Mr. and Mrs. Smith Cuninghame commenced the action out of which the present appeal arose against the widow, Mrs. Anstruther, and against Miss Lucy Anstruther, and also against the deceased Mr. Anstruther's trustees, requiring them to separate his funds from those of his first wife; calling also for a declarator that there had been no proper apportionment of the mother's estate or of the £4000; and insisting that the pursuers were entitled to one-third of the provisions contained in the marriage settlement of 1828, giving credit for the £5000 already received.

It was decided by the Court of Session, First Division (*diss.* Lords NEAVES, ARDMILLAN, and KINLOCH), that all claim on the part of Mr. and Mrs. Smith Cuninghame under the marriage settlement of 1828 was excluded by the discharge or release contained

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in their own marriage settlement of 1847. The Court below, therefore, on the 11th of July, 1870, assolized the defenders from the conclusions of the summons, and found the pursuers liable in costs.

* Mrs. Mercer with her husband sued for a third share [* 226] of the funds provided by the settlement of 1828, giving credit for the £5000 already received.

On the 6th of March, 1871, the Court of Session decided against her as to the £4000 which came from her father; but decided in her favour as to the funds which came from her mother; the Court holding that Mrs. Mercer's case differed from that of Mrs. Smith Cuninghame, inasmuch as at the date of Mrs. Mercer's marriage the property had become vested in herself and her sister Miss Lucy (3rd Series, vol. ix. p. 618). This was ruled by seven Judges, Lord DEAS dissenting.

Against this judgment of the 11th of July, 1870, Mr. and Mrs. Smith Cuninghame appealed to the House, having for their counsel the Solicitor-General (Sir George Jessel, Q.C.) and the Dean of Faculty.¹

Mrs. Anstruther and Miss Lucy put in their answer and also their cross-appeal, being represented at the bar by the Lord Advocate (Mr. Young, Q.C.) and Sir Roundell Palmer, Q.C.

The following opinions were delivered by the Law Peers:—

The LORD CHANCELLOR (Lord HATHERLEY):—

My Lords, the question in this case is as to the legal effect to be given to the original marriage settlement of 1828,—to the two settlements executed on the marriages of Mrs. Cuninghame and Mrs. Mercer, respectively,—and to the £20,000 made over to Miss Lucy Anstruther, for which she gave her discharge. The ultimate conclusion come to in Mrs. Cuninghame's case by the majority of the learned Judges below was, that the £5000 provided in her settlement, coupled with the release or discharge which she gave, operated as a complete extinguishment of her rights under the marriage settlement of 1828, and, therefore, of course, the consequence was an absolute failure of her action.

¹ Mr. Gordon, Q.C., the Dean of Faculty, doubted whether he ought not to lead the English Solicitor-General as he does the Scotch. But Lord WESTBURY cleared the difficulty by mentioning that when His Lordship held the office of English Solicitor-General, it was determined that he should precede the Dean of Faculty.

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In Scotland, as here, when there is a power of apportionment of * this description existing in the parent, he need not exercise it over the whole fund at one time; he may apportion it at intervals as the exigencies of his family require. The very object of such a power is to provide for such exigencies as they occur.

One argument which was pressed upon us for a different construction was, that the interest being a *spes successionis*, contingent during the lifetime of both the father and the mother, it might have failed in both of the funds had Mrs. Cunningham predeceased the distribution and the period of her acquiring a complete and absolute interest in it; and therefore it was contended that the payment of the £5000 on the part of the father might be regarded (as some of the learned Judges, who were, in fact, the majority, decided) as a purchase by the father of the absolute right to all the interest of the child in the fund, and not as an apportionment of the fund itself. Now it appears to me that there are two reasons very strongly weighing against such a conclusion. In the first place, the very notion of a parent bargaining with his child, in the language used by the learned Judges in Scotland, entering into a transaction with his child for the purpose of purchasing her share in this species of expectancy, would be inconsistent with the law which has prevailed, I apprehend, in every country as to the protection of a child's interest — such a protection as makes it very difficult indeed for a parent under any circumstances to deal with a child: and certainly does not render it possible for him to do so without the child being fully informed of all the rights vested in such child. Therefore one would hesitate at any time to give to an instrument the construction of a bargain on the part of the parent in respect of an expectant interest on the part of his child.

Now here the child was not of full age. She was only eighteen, and she had to look to the parent, and to that parent only, for protection. Some of the learned Judges say that the intended spouse might have afforded her sufficient protection. They seem to think that that actually was the case, and that she was so protected. But, I think, according to any system of law that can be administered in any civilised country, it could not be permitted that a parent, without the fullest evidence of such being the intention, and the circumstances of the case warranting the: [* 228] intention and * warranting the transaction, should become

the purchaser of an unascertained interest in the child, an interest which could never be ascertained if the child died in the mother's lifetime, for a sum of money paid down, when the child's necessities required it, at the period of her marriage.

But I think there is abundant evidence to show that the parties did not intend anything of the kind. In the first place the father and mother joined. If it was an interest to be acquired by the father, why did the mother join at all? In the next place, there is no previous recital of the settlement until we come to the discharge, and when we come to the discharge we find it to be an express discharge of all rights, and "all claims whatsoever, by or through the death of her said father or mother, or by the contract of marriage entered into between her said father and mother, and as the share or division hereby allotted to her of her said father and mother's property settled by the said contract."

Now it seems to me that there is quite plain and sufficient reference to the instrument and to the object and intent of the parties in the very form there used, and though it is quite true that it goes on to give a general release of her father's property under any circumstances whatever, yet even that is not inconsistent with the original settlement, because in the original settlement whatever portions the children were to take under the settlement of 1828 are there expressed to be in discharge of whatever share they might be entitled to of the parent's property, either by way of *legitim*, portion natural, or otherwise. So that it is only repeating the effect intended to be given to the original settlement and to the taking under that settlement.

The argument was, that it operated as an appointment to her of the £5000, and a discharge by her of all further interest in the existing fund, and that thereupon there was an actual handing over of the residue of the fund to the other two children.

I do not think that the instrument bears at all that construction, and it is a construction which one would not place upon it unless some very clear words to that effect occurred. For observe what might happen, and what, in fact, really did happen. On the next daughter marrying, Mr. Anstruther does the same thing: he gives £5000 in the same form, and with the same discharge, and * there is very little doubt that if Lucy had [* 229] married the form would have been exactly the same in her case, or at least it might have been so, so that he might have

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made three appointments of £5000 each. And having thus provided £15,000 out of the £60,000, he might have said the fund will now go back to the parties who provided it; so that the provisions originally contemplated would never have taken effect. But that would be an entire contradiction of the whole scope and frame of the original settlement, which was that the children were to take the whole, except where it was disposed of for onerous consideration.

It appears to me that this dealing with this sum of £5000 could only take effect as an apportionment *pro tanto* of the fund, leaving the rest of the fund to be apportioned. It was said even by those who opposed Mrs. Cuninghame's claim that they could not put their argument so high as to say that the parent had no right to increase her portion if he thought fit.

It was conceded, as regarded the father, that however he might be himself protected by the discharge, he was not himself prevented from making a further apportionment if he thought fit.

When we come to Mrs. Mercer's case the sole difference is this: The mother having died, that interest which had been previously *à spes successionis* became absolute in Mrs. Mercer as regards the mother's property, subject only to the life-rent of the father.

The learned Judges were unanimous, I think, upon this case of Mrs. Mercer in setting aside the discharge in Mrs. Mercer's settlement.

LORD CHELMSFORD. — Lord DEAS differed (Court of Session, 3rd Series, vol. viii. p. 1028).

THE LORD CHANCELLOR. But the other Judges, I think, all concurred, because they said that in Mrs. Mercer's case the discharge was made in ignorance of her position, that there was ignorance of the true state of the case as regarded her, namely, that she would be placed in a much more favourable position than that of Mrs. Cuninghame by the circumstance of her mother's death and her having acquired a positive interest in this fund with which she was parting to so large an extent.

[* 230] * I apprehend that what has happened is this: An apportionment was made, first of £5000, part of the fund, to Mrs. Cuninghame, and her discharge has not prevented her having any other part that may be unapportioned. And Mrs. Mercer is

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placed in the same position. So that the two sums of £5000 having been taken out of the fund, it now remains to be seen what is to be done with the rest of it.

Then there is the dealing with Lucy, which is subject to the same remarks, namely, that there is an express recital that it is intended to operate by way of apportionment of the fund, and there is a discharge by Lucy, as in the other deeds. Therefore, it appears to me that the proper conclusion to come to is, that the £20,000 made over to her must be taken as an apportionment of the fund *pro tanto*. So that the sum of £30,000 out of the whole fund has been apportioned. It is said that the £30,000 exhausts the whole fund. We have every reason to suppose that it does not; but that must be a subject of inquiry, and the surplus, when ascertained, will have to be divided among these three ladies in equal proportions. I think that that in substance really reaches the whole of the case we have before us. It may be reduced to these simple propositions:—the first being that the children, in the event of the fund not being alienated for onerous cause already, had the right which has now accrued in the two funds, that of the father and that of the mother; secondly, the sum paid over to the first child, and accepted by her as her allotted portion, does not operate to bar and sweep her out of the whole benefit to be derived from the settlement, but only operates *pro tanto* as far as the £5000 goes: and, thirdly, the sum allotted to Mrs. Mercer in effect amounts to a similar appointment of the £5000 apportioned to her. And therefore your Lordships will have to make a declaration that the settlements of Mrs. Cunningham and Mrs. Mercer are respectively appointments or apportionments under the power contained in the settlement of 1828. But the alleged release contained in each of those settlements does not amount to or effect any bar to the right of participation in any portion of the property, subject to the power of apportionment which may not be apportioned under that power. And that the release given by the third child in the same way does not operate as barring her from *taking any share in the remaining fund, and that the gift [*231] made by the trust settlement of 1866 of £20,000 to the third daughter Lucy is also an appointment to Lucy under the power, which it was fully competent to the donee to make, and then to order that if the two sums of £5000 and £20,000 do not in the aggregate amount to the whole of the funds brought into the

two settlements, the balance of those funds is unappointed property, and is distributable under the trusts of the settlement of 1828 among the three children in equal shares; and that there must be an inquiry in order to ascertain of what those funds consist.

I ought to add that the LORD CHANCELLOR of Ireland (Lord O'HAGAN), who was present at the hearing of this case, concurs in the opinion which I have expressed, that the sums advanced to Mrs. Cunningham and Mrs. Mercer were in effect appointments, and that they were not debarred from sharing in the fund which might remain unappointed and unappropriated. I am not, of course, able to say that he has known absolutely all that I have now stated, but he assents to my conclusions.

Lord CHELMSFORD :—

My Lords, the questions upon this appeal may be conveniently considered under the following heads :—

(1.) What is the nature of the right or interest which the children of Mr. and Mrs. Anstruther took under their parents' marriage contract?

(2.) Was the power of apportionment amongst their children contained in that marriage contract duly exercised by the obligation which the parents jointly took upon themselves in Mrs. Cunningham's marriage contract, and Mr. Anstruther alone in Mrs. Mercer's marriage contract, to pay £5000 to trustees in trust for them and their children respectively, and by the acceptance by each of them of that sum in satisfaction of all claims which they had under the marriage contract of their parents?

(3.) Is there any ground for the reduction of the clause of discharge in Mrs. Cunningham's and Mrs. Mercer's marriage contract, or either of them?

(4.) Assuming that the sums of £5000 paid to trustees [* 232] for Mrs. Cunningham and Mrs. Mercer on their respective marriages were proper exercises of the power of apportionment, and that the £20,000 given to Lucy Anstruther by her father upon his second marriage was also a good apportionment of that sum to her, and that these several sums did not exhaust the fund over which the power existed, how is the unappropriated fund remaining after the apportionments to be dealt with?

The nature of the right and interest of the children under the

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marriage contract of Mr. and Mrs. Anstruther seems to me to admit of little dispute. In each case of the property brought into settlement the fee was in the party from whom it proceeded, subject respectively to a life-rent in the other surviving; and the children had a succession which has been indifferently called a *spes successionis* and a protected interest; but whatever its proper name, it was a contingent right, which could have been defeated by a disposition for onerous causes, but not by a gratuitous alienation.

Upon the death of both their parents the children would have been entitled equally to the whole of the property, whether derived from their father or their mother, unless the power of apportionment amongst them contained in the marriage contract were duly exercised. That power, as to the father's £4000, is reserved to him to divide and proportion as he should think proper in favour of the children, and the mother surviving him was to have the same power; and as to the property provided by the mother, the power to divide and proportion it among the children was given to the parents during their joint lives, and afterwards to the survivor; and in both cases, failing any division, the provisions were to be divided among the children equally, share and share alike.

The next question, therefore, to be considered is, whether this power of apportionment amongst the children was duly exercised by the obligation to pay £5000 to trustees under Mrs. Cuninghame's and Mrs. Mercer's marriage contracts respectively, and their acceptance of those sums in satisfaction of all their claims under the marriage contract of their parents. There is no difference in the cases of these two children, except that at the time of Mrs. Mercer's marriage her mother was dead, and the obligation to pay the £5000 was undertaken by the father surviving. The clause of *discharge of their claims is in the same terms, [*233] *mutatis mutandis*, in the marriage contracts of each of the daughters.

Taking Mrs. Cuninghame's as the example, it runs thus:—

“ And which said sum of £5000 is hereby declared to be, and the said Maria Anstruther hereby accepts of the same in full satisfaction of all *legitim*, portion-natural, or bairns' part of gear, and of all claims whatsoever which she (the said Maria Anstruther) has in any manner of way by or through the death of her said father or mother, or by the contract of marriage entered into between her said father and mother, dated 24th and 26th days of March, 1828,

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and as the share or division hereby allotted to her of her said father and mother's property settled by said contract, all which claims are hereby settled accordingly."

It was argued on the part of the appellants that this could not have been intended as an execution of the power of apportionment, because there was no reference to the power, and because of the release, not only of the daughter's claim under the marriage contract of her parents, but also of her *legitim*, portion-natural, and bairns' part of gear; but that it was a transaction between the father and daughter, by which he, paying the £5000, not out of the trust funds, but from his own moneys, purchased the release of his daughter's claims for his own benefit; and that this opened to the appellants the grounds of reduction of the clause of discharge upon which they insisted.

It appears to me that the obligation to pay the £5000 was intended to be, and was understood by all parties to be, an execution of the power of apportionment. Little reliance can be placed upon the circumstance that the clause contains no express reference to the power. As Lord St. LEONARDS says in his book on Powers (8th ed. p. 289), a donee of a power may execute it without referring to it, or taking the slightest notice of it, provided that the intention to execute it appears. And the reason of this is given in *Scrope's Case*, 10 Co. Rep. 511, to which he refers, "*Quia non refert an quis intentionem suam declarat verbis, an rebus ipsis, vel factis.*"

It appears clearly that the power must have been in the contemplation of the parties, from the words of acceptance of the £5000 by Mrs. Cuninghame in satisfaction (*inter alia*) of the share or division thereby allotted to her of her said father and mother's property settled by the marriage contract. It seems difficult

to put any other construction upon these words than [*234] * that of an acknowledgment that the £5000 was the

share or division which Mr. and Mrs. Anstruther had the power to allot by their marriage contract. The acceptance of this sum, not only as the allotted share, but also in satisfaction of the *legitim*, portion-natural, or bairns' part of gear, which is used as an argument against its being an exercise of the power, strengthens my opinion that it must have been so intended. For the creation or reservation of the power in Mr. and Mrs. Anstruther's marriage contract is immediately followed by the words: "Which provisions

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conceived in favour of the child or children of the said marriage shall be in full satisfaction to them of all bairns' part of gear, *legitim*, portion-natural, executry, and everything else that they should ask or claim by and through the decease of the said James Anstruther, their father, except what he may think fit to bestow of his own good will only." The satisfaction of these rights and interests would have followed upon the due execution of the power; and therefore it was unnecessary that it should have been expressly mentioned; but having been so, it shows that the clause must have been framed with direct reference to the power, and it leaves no doubt in my mind that it was intended to be an exercise of it.

An objection was made to the execution of the power, that the appointment of the £5000 to the daughters respectively was not confined to them, but made to others who were not objects of the power. This is answered by the case of *White v. St. Barbe*, 1 V. & B. 339 (p. 499, *ante*), in which it was decided that under a power to appoint among children interests may be given to grandchildren by way of settlement, with the concurrence of their mother (an object of the power) and her husband.

Having shown that the £5000 given to the daughters upon their respective marriages was in exercise of the power of apportionment, and not a transaction with their parents, the next proposed question as to the reduction of the clauses of discharge in their marriage contracts, and all the evidence given as to their ignorance of their rights at the time of their acceptance of the £5000 in satisfaction of their claims, falls to the ground. Because if a parent has a power of appointing a fund amongst children in such proportions as he may think proper, he may exercise that *power at his own will and pleasure; and whether the [*235] child who has a share allotted is a minor or of full age, or whether he knows or is ignorant of the extent to which he might eventually become entitled in succession, or whether he expressly accepts or not the provision which is made for him, is wholly immaterial, as he can by no possibility control the parent in his discretion to distribute the fund amongst the children as he thinks proper.

Mrs. Mercer's case differs in no respect in the character of the provision made for her upon her marriage from that of Mrs. Cuninghame. Both were in exercise of the power of apportionment or neither. Mrs. Mercer's release of her claims could only be re-

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duced upon the ground of its being a transaction with her father in ignorance of her rights in the succession to her mother's property; and if it were of that character, the clause in Mrs. Cuninghame's marriage contract is precisely similar. I cannot understand if, in Mrs. Mercer's case, it was a transaction which ought to be reduced, why the same conclusion was not adopted in favour of Mrs. Cuninghame. The LORD PRESIDENT draws this distinction between the two cases: "When Mrs. Smith Cuninghame was married in 1847" (he says) "she had nothing but a contingent claim against either her father or mother under their marriage contract, and she was receiving a present consideration in money for a discharge of that contingent claim. But when Mrs. Mercer was married in 1861 she had much more than a contingent claim: she had a joint fee along with her sister Lucy in the whole estate of which her father was life-renter." But with great respect the question in the case of both the daughters was not as to the nature of their rights, but as to their knowledge or ignorance of them: and in this view it seems to be immaterial whether the interests with which they were respectively dealing were contingent or vested. If they are to be considered as transactions which may be reduced on the ground of ignorance of facts which disabled the daughters from exercising a right judgment whether they should accept the £5000 in satisfaction of their respective claims, the case of Mrs. Cuninghame seems to be stronger in favour of reduction than that of Mrs. Mercer, as she was a minor, and her natural guardian, her father,

does not appear to have afforded her the protection which [*236] she was entitled to expect from him. I could *not avoid

making these remarks upon the interlocutors of the Court of Session reducing the clause of discharge in Mrs. Mercer's marriage contract, and refusing to do so with respect to a similar clause in the marriage contract of Mrs. Cuninghame, although, as I have already shown, these clauses being in both cases introduced into the contracts in the exercise of the power of apportionment contained in Mr. and Mrs. Anstruther's marriage contract, reduction of them is out of the question.

There only remains to consider what is to be done with the trust fund which, after all the allotments made in exercise of the powers of apportionment, is left unappropriated. I do not think that by these allotments the parents put it out of their power to increase the provision made for the daughters; nor was the joint power in

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Mr. and Mrs. Anstruther so exhausted by their exercise of it in Mrs. Cuninghame's favour, as to render it incompetent to Mr. Anstruther surviving, to make an addition to what had been before given to her.

Out of the unappropriated residue of the fund a sum of £20,000 was given to trustees by Mr. Anstruther for his daughter Lucy upon the occasion of his second marriage. There was a doubt suggested in argument whether this ought to be regarded as an appointment of the fund over which the power existed, or was not rather a bargain with Lucy out of Mr. Anstruther's own property. He certainly entertained the idea that after the death of his first wife he had the absolute fee in her property. And the trust disposition and settlement upon his second marriage with Miss Anderson proceeds upon this supposition. He thereby assigns, disposes, conveys, and makes over to trustees his whole means and estate, heritable and moveable, real and personal, in trust after payment of his just and lawful debts, death-bed and funeral charges, and the expenses of carrying the trust into execution, to pay over or invest the sum of £20,000 for the sole use and behoof of Lucy Anstruther and her heirs and assignees. And his trustees are to hold and invest the sum of £30,000 for payment to his promised spouse of the interest during her lifetime, and after her death the principal to the children of the marriage. The whole of the settlement has more the appearance of a disposition of his own property than of the exercise of a power by * which his authority was limited. But as in the allot- [*237] ment of the shares of the two other daughters the provision for Lucy is declared to be in full satisfaction of all claims she may have for bairns' part of gear, *legitim*, portion-natural, or through the marriage contract between her father and mother, and Lucy in token of accepting the provisions in full of all such claims subscribes the settlement, I think that if it had been to Lucy's interest to reject this provision as not being an exercise of the power of apportionment in her favour, it would not have been competent to her to do so; nor can her sisters successfully contend that there has been no due exercise of the power to the extent of this £20,000. But the £30,000 given to the second wife could only be a valid disposition if Mr. Anstruther were far of the fund remaining unapportioned amongst the children of his first marriage, because it would then be, as the LORD ORDINARY said, "Subject to his dis-

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posal for onerous causes or just and rational consideration." But he having only a power to divide and proportion the fund amongst the children of the first marriage, the disposition to the second wife was clearly void, as she was not an object of the power. The result is, that the whole remaining fund, beyond the two sums of £5000 to Mrs. Cuninghame and Mrs. Mercer, and the £20,000 to Lucy Anstruther, comes to be distributed equally amongst the three sisters, share and share alike, according to the provisions of the marriage contract of Mr. and Mrs. Anstruther.

I agree with my noble and learned friend in the judgment which he has proposed to your Lordships.

Lord WESTBURY :—

My Lords, it is matter of regret to observe the uncertainty and variety of opinions upon what in England would be deemed a very simple case; where, however, our Courts would not proceed upon any grounds that are not common to the jurisprudence of Scotland in this matter.

I must advert to the notion that seems to have been entertained by some of the learned Judges of the Court below, that the language of this power required an execution *uno flatu*—once [238] for all.¹ * Some of them appear to have imagined that the language required an entire apportionment, and that it did not admit of appointments from time to time; which would be to put an interpretation on the words utterly at variance with the objects of the power, and utterly subversive of any useful application to be made of the power. No appointment could be made to a child settled in life or married, until all the other children had also become of such an age that their future destination could be ascertained and fixed. It is quite clear that the reason of the thing demands that the power given to the parents—in one instance to the father, in the other instance to both parents—to apportion at any time must be interpreted so as to warrant the appointment being made from time to time; and so, in truth, it appears to have been conceded at the bar, because it was admitted that after the appointment to Mrs. Cuninghame and to Mrs. Mercer further appointments might have been made.

The next difficulty felt by the learned Judges in the Court below was on the words which have been denominated a "release" in

¹ See the opinions, Court of Session, 3rd Series, vol. viii. p. 1017.

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the appointment to Mrs. Cuninghame and in the settlement for Mrs. Mercer, and various effects have been ascribed to these alleged words of release. Some learned Judges appear to have imagined that they operated as an assignment by contract to the father, or the donee of the power, of the whole extent of the portion which in an equal division of the entire fund might have been attributed to the objects of the power. Now, it is quite clear that that would destroy the very foundation upon which the powers given to the parents are rested. If it were possible to admit any contract between a father and a child as the reason for the exercise of the power, fraudulent transactions might be introduced, destructive of the interests of the child, and giving to the father that which he ought not to obtain. In accordance with the settled principles of equity, it is impossible to hold that the father could gain any benefit to himself in the residue of the trust fund by having made an appointment of one part of it as to one of the children.

• But some of the Judges imagine that the release might enure to the benefit of the two other sisters who were the objects of the power. Sometimes it was imagined that the release of Mrs. Mercer's *settlement might enure to the remaining [*239] sister. It is utterly impossible to find in either settlement any contract to that effect, or that the words should receive that interpretation, even if it were possible that such a transaction should have force given to it consistently with an honest exercise of the power. The truth is, that what are called the words of release amount to no more than this, — that the sum appointed to the child shall be taken as part of the settlement provision in which the child under the trust settlement had an interest. The whole case, therefore, assumes a very simple aspect as soon as the ordinary suggestions of common sense are applied to the interpretation and to the effect which, having regard to the intention of the power, ought to be attributed to it.

Now, the relative position of the children is perfectly clear. They stand on an equality with regard to the undistributed and unappointed parts of the fund. The father's right to determine the quantity is thereby acknowledged, so far as he has exercised that right. He thought proper to appoint £5000 to Mrs. Cuninghame, reserving, of course, the right of making a further apportionment. In like manner he has given £5000 to Mrs. Mercer, and in like manner he has given to Miss Lucy £20,000. But,

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supposing these sums not to exhaust the fund, the residue falls under the disposition contained in the settlement, and will be divisible equally among the three sisters.

I consider that the settlements on Mrs. Cunningham and Mrs. Mercer are respectively appointments under the power contained in the settlement of 1828. I prefer the word "appointment" because the word "apportionment" seems to imply a dealing with the entirety of the fund. But the alleged release contained in each of the settlements does not amount to, or effect, any bar to the right of participation in any portion of the property, subject to the power of appointment, which may not have been appointed under the power. Neither does the release give to the third child, or operate by implication as an appointment to the third child, of the residue of the funds which were subject to or comprised within the power. The gift made by the trust settlement of 1866 (that is, Mr. Anstruther's will) of £20,000 to the third child, Lucy, is, in my opinion, an appointment to Lucy under the power, and [*240] which it *was fully competent to the donee of the power to make. But if (as in this case) the two sums of £5000 and the £20,000 do not together equal the aggregate amount of the funds brought in by Mr. Anstruther under the settlement of 1828, and of the funds of Mrs. Marian Anstruther, also brought into that settlement, the balance of these funds (after deducting the three sums amounting in all to £30,000) is unappointed property, and is distributable under the trusts of the settlement of 1828 among the three children in equal shares; for I do not think the children are bound in this division of the surplus to bring into hotchpot the sums appointed to them respectively. The right of the children to the provisions brought in by Mr. and Mrs. Anstruther under the settlement of 1828 was not defeated by the provisions for the second Mrs. Anstruther under the settlement of 1866. On the death of Mrs. Marian Anstruther, her surviving husband became liar in trust of all the property brought in by Marian, and could not defeat the interests of the children.

Therefore the interlocutor of the 11th of July, 1870, was totally wrong. The judgment in Mrs. Mercer's case is wholly inconsistent with it, inasmuch as it finds that Mrs. Mercer was entitled to share with her sister Mrs. Cunningham in the estate and effects of their mother so far as not settled and appropriated by their father and mother jointly, or by their father after their mother's

death. It will be observed that my observations would give the surplus to the three sisters. The difference of the decision in *Mrs. Cuninghame's* case from that in *Mrs. Mercer's* case cannot be supported by any difference in the wording of the alleged releases in the two settlements, for they are identical. And it is evident that the question as to the fee of the settlement funds is wholly immaterial, it being admitted that the power of apportionment remained unaffected, and that, subject to that power, the effect of the settlement of 1828 was to give the whole of the settlement estate to the three children as substitutes to their parents in equal shares.

There is no question with any creditor or alienee for value of *Mr. Anstruther*.

I think it expedient that the order of the House shall embrace both appeals. Subject to any alteration that may hereafter be deemed advisable, I will read what I should propose as the form * of the judgment for the information of the court- [241] sel at the bar: — [Here Lord WESTBURY gave the heads of the judgment which was afterwards adopted by the House.]

There is a point which I must submit to your Lordships' attention, and that is the question how the enormous amount of the costs which have been incurred in this unfortunate litigation are to be met. Now, considering how the decisions in this case have varied, the wanderings of the parties themselves may in some degree be excused, and I should, therefore, humbly submit to your Lordships that the costs of all the parties should be paid out of the free estate of *Mr. Anstruther*.

I am desirous that if possible we should dispose of this matter in such a way as not to leave any door ajar that may be pushed open in the Court below so as to admit of further litigation. Whether we can do that or not may be very problematical. I understand that your Lordships wish to reserve to yourselves the power of considering the exact form of your order. I am not at all sure that the words I have now read comprehend the whole of the matter, but in case any alteration therein should be desirable, perhaps your Lordships will approve of the form of account being given, before the order is made, to the counsel on either side, not to afford an opportunity for any further argument at the bar, but that they may be at liberty to send in such amendments in the form of account as they may think desirable.

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The LORD CHANCELLOR :—

My Lords, with reference to the last remark that my noble and learned friend has made regarding the expense of this litigation, I should go so far with him as to think that ultimately Mr. Anstruther's property, he being really the cause of the mode in which these instruments were executed, and therefore the source of the vexation and intricacy that have subsequently occurred in solving the various questions which have arisen, might be charged with that expense; but one does not know how the course of events may turn out with reference to the proportion of property in the several estates. As between the three sisters I apprehend that all costs should come equally, if they are obliged to have recourse to their own funds, out of that free fund which is [*242] left after the apportionment, *but having recourse to the father's estate, in the event of that estate being sufficient to answer them, in order to recoup the diminution of the fund. The father's estate therefore will pay the costs in the first instance, if sufficient to do so. If not, the costs will necessarily have to come out of the fund to be divided.

Lord WESTBURY. — I have not the least objection to that.

The LORD CHANCELLOR. — Then the questions will be, that the interlocutors complained of, so far as they are inconsistent with the declaration afterwards to be contained in your Lordships' order, be reversed. We will postpone the exact form of the declaration, though I believe we agree in substance with the proposal of the noble and learned Lord. And as to the expenses, that they be borne in the manner prescribed in the form of order as it will be finally drawn up.

The final judgment of the House was as follows :—

“ Ordered and adjudged, That the interlocutor of the 11th of July, 1870, be reversed; and that such parts of the interlocutors of the 18th of March, 1869, and of the 6th of March, 1871, as are inconsistent or at variance with the findings and declarations and order hereinafter expressed, be also reversed; and this House doth find and declare, That the marriage settlement of Mrs. Cuninghame, and the marriage settlement of Mrs. Mercer, were respectively valid appointments of the two sums of £5000 in exercise of the power contained in the settlement of 1828; but that such

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appointments did not exclude Mrs. Cuninghame or Mrs. Mercer from participating in so much of the funds or property comprised in the said deed of 1828 as have not been appointed under the powers therein contained. And this House doth further find and declare, That the trust disposition and settlement of Mr. Anstruther of the 8th of October, 1866, was a good appointment under the power in the said deed of 1828 to Lucy Anstruther of the sum of £20,000, but that she is not thereby debarred from participating equally with Mrs. Cuninghame and Mrs. Mercer in the residue of the settlement funds of 1828 (if any) remaining unappointed or unexhausted by the said three appointments. And this House doth further find and declare, That according to the true construction of the powers contained in the said settlement of 1828 the same admitted of being validly exercised from time to time by several appointments. And this House doth further find and declare, That the estate of Mr. Anstruther is entitled to have credit in the account hereinafter directed for the two sums of £5000 paid by him to the trustees of Mrs. Cuninghame's and Mrs. Mercer's settlements and for any sum received by Miss Lucy Anstruther on account of the sum of £20,000. And this House doth further declare and direct, That a reference be * made to such [*243] person as the Court of Session shall appoint under the remit hereby made to take the following accounts: 1. An account of all the funds, moneys, and property that were comprised in or became subject to the trusts or dispositions expressed or made in and by the said settlement of 1828, and of the manner in which the funds, moneys, and property at the death of the said James Anstruther, and to ascertain and state what, if anything, was at the time of his decease due from the said James Anstruther (subject as aforesaid) in respect of any trust property or principal trust moneys received by him and applied to his own use, and to ascertain and state the balance due from the estate of the said James Anstruther to the trust estate under the said settlement of 1828; and, if necessary, to take an account of all the estate of the said James Anstruther not comprised in or subject to the trusts of the said settlement of 1828 and of the receipts and payments of his trustees or representatives in respect of such estate (not subject as aforesaid), and to ascertain what estate of the said James Anstruther is applicable to the payment of the balance that may be found due from him to the trust estate under the said settlement of 1828 as aforesaid.

And it is further ordered, That the expenses of all parties in the Court of Session, being taxed under the direction of the said Court, and the costs of all parties in respect of this appeal, the amount thereof being certified by the Clerk of the Parliaments, be paid as follows, namely, the costs and expenses of the trustees of the said James Anstruther shall be paid out of the free estate of the said James Anstruther; and if any balance of the said free estate shall remain after such payment, the costs and expenses of the several other parties shall be paid out of the said balance, and if the same be deficient, then the last-mentioned costs and expenses, or any balance thereof, shall be paid out of the residue of the said settlement funds remaining unappointed or unexhausted as aforesaid. And it is also further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with these declarations, findings, and directions, and this judgment."

ENGLISH NOTES.

In the litigation reported as *Topham v. Duke of Portland* (1863–1869). 1 De G. J. & S. 517, 11 H. L. C. 32, L. R. 5 Ch. 40, 32 L. J. Ch. 257, 34 L. J. Ch. 113, 39 L. J. Ch. 259, the question of fraud on a power arose in various ways. The Duke, having a power of appointment amongst younger children, and being minded to prevent or discourage an intended marriage of one of his daughters (M.), appointed to a son (H.), without any previous communication to him, a double portion, intending that the half of this portion should be held in suspense until paid over in the way directed by a deed of declaration of trust, which was subsequently executed by this son, under the directions of the Duke. It was held that the appointment to the son of the moiety, being made for a purpose evasive of the object of the power, was bad.

There was another fund placed in trust by the same Duke for the two daughters, M. and H., with an exclusive power of appointment to his son, the succeeding Duke. After the death of the former Duke, M. married the person objected to; and the succeeding Duke, by a revocable appointment, which was not communicated to H., appointed the entire fund to her. It appeared that the object of this appointment was that half of the fund should be held in suspense, so as ultimately to be dealt with according to the wishes of the late Duke. The whole appointment was held bad: — the House of Lords giving their judgment without prejudice to a further exercise of the appointment. The Duke subsequently, with the privity of H., made an irrevocable appointment

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of the whole to her. It did not appear, however, that the motives or intention of the parties had in any way altered; and the Court of Chancery held the appointment bad, on the ground of the evasive intention; although the Duke, as they considered, would have been perfectly justified in appointing the whole to H., with the intention that she should have the exclusive enjoyment, whether on the ground of M. having married contrary to the wishes of their father, or on any other ground.

Formerly it was a frequent question whether an appointment were not invalid by reason that one or more of the objects of the power had been excluded or given a merely illusory share. Any such question is now avoided by (1) The Illusory Appointment Act, 1830 (11 Geo. IV. & 1 Will. IV.), c. 47, and by the Powers of Appointment Act, 1874 (37 & 38 Vict.), c. 37, the former of which enacted that an appointment should not be impeached on the ground that an illusory share was given to any object; and the latter, that the appointment should not be invalid on the ground that an object was excluded.

AMERICAN NOTES.

The American cases on the subject of the fraudulent execution of powers are but few in number, but they are sufficient to show that the Courts of this country unhesitatingly adopt the English rule, that any attempt on the part of the donee of a special power to gain a benefit to himself in consideration of the execution of the power in a certain way will be regarded as a fraud on the power, and will render the execution of the power void. *Degman v. Degman*, 98 Kentucky, 717; *Thomson v. Norris*, 20 New Jersey Eq. 489, 527; *Holt v. Hogan*, 5 Jones Eq. (N. Car.) 82; *Shank v. Dewitt*, 44 Ohio State, 237; *Bostick v. Winton*, 1 Sneed (Tenn.), 524; *Cruse v. McKee*, 2 Head (Tenn.), 1, 6. Such is the universally accepted doctrine of the text-books. 1 Story, Equity Jurisprudence, 13th ed. sect. 255; 2 Pomeroy, Equity Jurisprudence, 2nd ed. sect. 920; Bispham, Principles of Equity, 6th ed., sects. 256-257.

In *Degman v. Degman*, *supra*, a testator bequeathed property to his wife for her life, with power to divide the remainder among his children as she should think best. It was held that she could not exercise the power by conveying to one of the children a portion greater than those granted to the others, on condition that the said child should assume the payment of her debts, and provide for her and her second husband during their lives.

In *Shank v. Dewitt*, *supra*, a testator devised and bequeathed all his property to his wife for life, with power to dispose of it among his heirs as she should think best. She deeded parcels of land to certain of the heirs for a valuable consideration paid her. It was held that this attempt to make appointments for her own benefit was an abuse of the power conferred, and void.

In *Bostick v. Winton*, *supra*, a father had a power of appointment among his children in such shares as he should choose. Being required to give bail

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for his appearance at Court to answer a criminal charge, he conveyed the estate to one of his sons in order to render him a good and sufficient surety on his bail bond. The son was to reconvey at the end of the prosecution. The father afterwards sold the land to a purchaser who knew all the circumstances, the son executing a deed to the purchaser, but receiving no part of the consideration. It was held that this exercise of the power, being for the father's own benefit, was void, and that the persons entitled in default of appointment could recover the land.

In *Thomson v. Norris*, *supra*, the Court held that an agreement by the donee of a power to refrain from executing it, in consideration of certain advantages to himself, is void for the same reason that a fraudulent execution would be. On pages 527-528, BEASLEY, Ch. J., said: "If it be lawful for the donee of a power to bargain for his own personal ends with a part of the appointees to exercise his authority in a certain mode, or to stipulate with the heirs-at-law or the next of kin to disappoint the expectations of the appointees by a surrender of his power, it is obvious in numerous cases the bulk of the fiduciary property would enure to the benefit of the donees themselves. It is on this obvious ground that Courts everywhere have been strenuous in enforcing the utmost good faith on the part of donees of powers. I think no case can be found in which such donee has been allowed to make his position, by any device, profitable to himself. . . . These authorities abundantly suffice to show that the principle is unquestionably established, that an appointment to further the selfish interest of the donee of the power will not stand. The doctrine rests upon the ground of the existence of constructive bad faith towards the donor of the power. And a gainful agreement to refrain altogether from the exercise of the power is necessarily equally fraudulent: it involves, no matter how pure the intentions of all parties may be, a constructive fraud."

See further *New v. Potts*, 55 Georgia, 420; *Wilks v. Burns*, 60 Maryland, 64; *Harty v. Doyle*, 49 Hun (N. Y.), 410.

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(1734.)

No. 19. — *IN RE TANQUERAY-WILLAUME AND LANDAU*

(C. A. 1882.)

RULE.

A CHARGE of debts in a will of real estate implies a power in the executors to sell the estate and to give discharges for the purchase-money.

And where the legal estate is devised to executors who

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are directed to pay the debts, and they sell within a reasonable time — say within twenty years — the purchaser is not bound to inquire whether there are any debts outstanding.

Elliot v. Merryman.

Barnardiston's Ch. Rep. 78-83 (White & Tudor Lead. Cas.).

Will. — Charge of Debts. — Implied Power of Sale.

Testator gave his estate to G., chargeable with the payment of his debts and legacies, and made G. his executor. G. sells a freehold estate of the testator to W. Seven years later a creditor files his bill against the purchaser to have his debt satisfied out of the estate. *Held*, that the purchaser had a good title to the land discharged of the debt; especially having regard to the length of time during which the creditor had lain by without enforcing his debt against G.

Thomas Smith became indebted to several persons by bond, [78] and likewise by simple contract. In three of these bonds Goodwin was bound with him as surety; and afterwards Goodwin gave his own bond alone to one of the creditors, to whom Smith was bound in a single bond. Smith, being thus indebted, made his will, and in the beginning of it, says:—"My will is, that all my debts be paid, and I do charge all my lands with the payment thereof." Then came the clause, upon which, together with the other circumstances of the case, the present question principally determines. "*Item*, — I give all my real and personal estate to — Goodwin, to hold to him, his heirs, executors, administrators, and assigns, chargeable nevertheless with the payment of all my debts and legacies." Of this will he made Goodwin his executor.

The testator died in 1724; Goodwin proved the will, and in that same year sold a freehold estate of the testator's to Hunt: in the year following sold a leasehold estate of the testator's to Wright; and in 1727 sold another estate of the testator's, consisting of both freehold and leasehold, to Merryman. In the several deeds by which these estates were conveyed from Goodwin to the purchasers, the will of Smith was recited; and to one of these deeds Elliot, a creditor of Smith, was a subscribing witness.

These *lands were sold in the neighbourhood by outcry. [*79] At the time of these sales the creditors, all of them, either lived in the town where Goodwin lived, or within three or four miles of it. During all this time, and till the year 1730, the

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creditors went on regularly, receiving their interest, which was at £5 per cent, of Goodwin. Goodwin was a solvent man till 1732, and then he became a bankrupt.

In 1734 the present bill was brought by the creditors of Smith, against the purchasers of these lands that have been mentioned, against Goodwin, and against the assignees under his commission, in order to have a satisfaction of their debts out of those lands which were sold by Goodwin.

Mr. Chute argued on the part of the plaintiffs, and for authority cited *Chadwick v. Doleman*, 2 Vern. 528, *Croce v. Drake*, 2 Vern. 616, *Pagett v. Hoskins*, Prec. Ch. 431, and the case of *Morley v. Webb*, determined by the present CHANCELLOR (Lord HARDWICKE).

Mr. Idle, on the same side, cited *Humble v. Bill*, 2 Vern. 444; and on the same side Mr. Murray cited the case of *Nugent v. Gifford* (1 Atk. 463), determined by the present CHANCELLOR.

Mr. Browne argued as counsel for Hunt and White, and for authority cited *Culpepper v. Aston*, 2 Ch. Cas. 115, and the case of *Abbot v. Gibbs*, 1 Eq. Cas. Abr. 358.

Mr. Noel argued on the same side, and cited *Newman v. Johnson*, 1 Vern. 45, *Cloudsley v. Pelham*, 1 Vern. 411, and *Fremoult v. Dedire*, 1 P. Wms. 429.

Mr. Hoskins argued as counsel for Merryman, and cited *Spalding v. Shalmer*, 1 Vern. 301.

MASTER OF THE ROLLS (Hon. JOHN VERNEY). — His Honour said, his opinion was, that the plaintiffs were not entitled [* 86] to the relief they sought by the * bill. He said it was very true, that it was almost impossible to make a determination in the present case, but that it must fall out unfortunately on the one party or the other. The dispute arising between creditors on the one side and purchasers on the other, both these sorts of persons are entitled to the favour of this Court: and in the present case a misfortune must fall upon one of them. On whom it is to fall is the question. And this is a question that must so frequently have happened, that it is extraordinary to find no determination directly in point.

The case is this: Thomas Smith, being possessed of a real and personal estate, was indebted to several persons by bond; in three of which bonds Goodwin was bound with him as surety; and he had contracted likewise some other debts, and being thus indebted

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he makes his will to the following effect. The will begins with this introduction: "My will is, that all my debts be paid; and I do charge all my lands with the payment thereof. *Item*, I give all my real and personal estate to — Goodwin, to hold to him, his heirs, executors, administrators, and assigns, chargeable nevertheless with the payment of my debts and legacies." 'Tis indeed true, that these words do not amount to a devise of the lands to be sold for the payment of the debts; and they only import a charge upon them for that purpose. However, this is such a devise, as is within the meaning of the proviso of the Statute of Fraudulent Devises (3 Will. & Mary, c. 14), and does interrupt the descent to the heir-at-law. By this will the devisee was made executor.

The testator died in 1724. Goodwin paid interest for the debts at £5 per cent regularly till 1730. After the testator's death three sales of this estate were made by Goodwin: one, of an estate which was entirely freehold; the other, of an estate entirely leasehold; and a third, consisting of freehold and leasehold both.

The bill in general is brought by the creditors of Smith against the purchasers, in order to have a payment of their debts out of the lands of Smith, which were sold to them by

* Goodwin.

[* 81]

With regard to the leasehold estate, the case is so extremely plain, that the sale of that must stand, and that the creditors cannot have a satisfaction out of it, that his Honour said, it would be monstrous to call it in question. The executors are the proper persons, that by law have a power to dispose of a testator's personal estate. 'Tis indeed true, that personal estate may be clothed with such a particular trust, that it is possible the Court in some cases may require a purchaser of it to see the money rightly applied. But unless there is some such particular trust, or a fraud in the case, it is impossible to say but the sale of the personal estate, when made by an executor, must stand; and that after the sale is made, the creditors cannot break in upon it.

His Honour said, he would now consider the other sales that have been made, and would examine those; first, upon the general rules of the Court; and in the next place, upon the particular circumstances which this case is attended with.

With regard to the first of these matters, the general rule is, that if a trust directs, that land should be sold for the payment of debts generally, the purchaser is not bound to see that the money

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be rightly applied. On the other hand, if the trust directs that lands should be sold for the payment of certain debts, mentioning in particular to whom those debts were owing, the purchaser is bound to see that the money be applied for the payment of those debts.

The present case indeed does not fall within either of these rules, because here lands are not given to be sold for the payment of debts, but are only charged with such payment. However, the question is, whether that circumstance makes any difference? And his Honour was of opinion, that it did not. And if such a distinction was to be made, the consequence would be, that whenever lands are charged with the payment of debts generally, they [* 82] could never be discharged of that trust without a suit in this Court; which would be extremely inconvenient. No instances have been produced to show that in any other respect the charging lands with the payment of debts differs from the directing them to be sold for such a purpose; and therefore there is no reason that there should be a difference established in this respect. The only objection that seemed to be of weight with regard to this matter, is, that where lands are appointed to be sold for the payment of debts generally, the trust may be said to be performed as soon as those lands are sold; but where they are only charged with the payment of debts, it may be said, that the trust is not performed till those debts are discharged. And so far indeed is true, that where lands are charged with the payment of annuities, those lands will be charged in the hands of the purchaser, because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund; but where lands are not burdened with such a subsisting charge, the purchaser ought not to be bound to look to the application of the money; and that seems to be the true distinction.

Having thus considered the case under the general rule, his Honour said he would now consider it under the particular circumstances that attend it: and the particular circumstances are such as are far from strengthening the plaintiffs' case, but rather the contrary.

One of those circumstances is the length of time the plaintiffs have lain by without at all insisting on any charge upon these estates. Goodwin was a solvent man till his bankruptcy in 1732. Here have been three purchases of these estates, made at different

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times, the one in 1727, the other two in 1725 and 1724; the first of them was made by Hunt, the second by White, and the third by Merryman. During all these transactions the plaintiffs do not mention one word of their charge upon this estate; but on the contrary regularly received their interest of Goodwin till the year 1730. 'Tis indeed true, that there is no express proof that the plaintiffs knew of these purchases, but there *is [*83] reason to imagine that they did. The purchases were made in the neighbourhood by outcry; some of the creditors lived in the same town that Goodwin did, and all of them lived within three or four miles of him; and Elliot, one of the creditors, was a subscribing witness to one of the purchase deeds. The want of notice too, on the part of the purchasers, is a considerable circumstance in their favour. 'Tis indeed true, that they had notice that there were debts chargeable upon this estate; but it does not appear they knew to whom those debts were owing. Another circumstance is, that Goodwin was a co-obligor in three of these bonds, and to another of the obligees he afterwards gave his bond alone, which may well be considered as a satisfaction for that bond. By this it appears that the creditors greatly relied upon Goodwin for their paymaster; and there is not much reason, therefore, that they should now be allowed to resort to the testator's estate.

Upon the whole, his Honour's opinion was, that the plaintiffs' bill must be dismissed, and even with costs, as against White, there being no manner of pretence for the plaintiffs to come upon that estate, it being all leasehold, and sold to White by the executor, who by law is the proper person intrusted to dispose of the testator's personal estate. However, with regard to the rest of the defendants, his Honour said, he would only dismiss the bill generally, without costs; and so he was pleased to decree accordingly.

In re Tanqueray-Willaume and Landau.

20 Ch. D. 465-483 (8. C. 51 L. J. Ch. 434 : 46 L. T. 542 ; 30 W. R. 801).

[465] *Will. — Charge of Debts. — Direction to Executors to pay Debts. — Devise to Executors. — Inquiring as to Existence of Debts. — Legal Estate. — Trust to pay or permit to receive. — Requisitions. — Objection to Root of Title not too late though stipulated Time expired.*

A testator directed that his debts should be paid by his executrix and executor thereafter named. He then devised all his freehold and copyhold estates to his wife and son, and bequeathed to them his leaseholds and other personal estate, and declared that his real and personal estates were devised and bequeathed to them "upon trust to pay the rents, issues, and profits, and the interest, dividends, and income of my said real and personal estates unto or permit the same to be received by my said wife during her life," and after her decease to raise and pay certain legacies to other persons which were to be treated as vested from his decease, and as to all the rest, residue, and remainder

of his real and personal estates after the death of his wife, he devised [*466] and bequeathed the same to his said son, his heirs, executors, administrators, and assigns, according to the natures and qualities thereof, and empowered him to postpone payment of the legacies for two years from the widow's death, the legacies to carry interest from her death. The widow and son were appointed executors. The testator died in May, 1871, and the will was proved by the executors. In June, 1881, the widow and son put up for sale part of the freehold estate, under conditions of sale providing that requisitions must be delivered within ten days from the delivery of the abstract; time to be of the essence of the contract. The purchaser made a requisition that the legatees must release the estate from their legacies. The vendors refused to procure their concurrence, on the ground that the real estates were charged with debts, and that the vendors could sell discharged from the legacies. The purchaser then asked whether any debts remained unpaid. The vendors declined to answer the question, and the point was then raised, after the time for sending in requisitions had expired, whether any charge of debts was created. The vendors persisting in their refusal to answer the question whether any debts remained unpaid, the purchaser took out a summons to have it declared that no charge of debts was created by the will, and if it was, then that the vendors were bound to answer the inquiry as to debts.

Held, by KAY, J., that as the purchaser's objection went to the question whether the vendors had any power to sell, he was not precluded by the conditions from raising it.

Held, further, that as the real estate was not devised to the executors in trust for other persons, nor devised to them beneficially in such a way as to give them equal beneficial interests, the question whether the direction to them to pay debts charged the real estate with debts was too doubtful for the title to be forced on the purchaser.

Held, on appeal, that the legal estate in the real property was not limited

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to the widow for life with remainder to the son, but was vested in the two as joint tenants in fee.

Doe v. Biggs, 2 Taunt. 109, distinguished.

Held, further, that as the executors took the whole legal fee as joint tenants, the direction to them to pay debts charged the real estate with debts, though they took unequal beneficial interests in it.

Held, further, that where executors in whom the legal fee is vested are selling real estate charged with debts, a purchaser is not bound or entitled to inquire whether debts remain unpaid unless twenty years have elapsed from the testator's decease.

T. B. Tanqueray-Willaume, by will dated the 25th of February, 1871, gave the following direction:—

"I direct my executrix and executor hereinafter named to pay all my just debts, funeral and testamentary expenses, as soon as conveniently may be after my decease."

The testator then, after making various dispositions of personalty, *devised to his wife, Esther Tanqueray- [*467] Willaume, and his son, T. B. Tanqueray-Willaume the younger, "trustees of this my will," all his real estates whatsoever and wheresoever of or to which he, or any person or persons in trust for him, was or were seised or entitled for an estate of freehold and inheritance, or which were of the nature of copyhold, and which he had power to dispose of or appoint by will (except estates vested in him in trust or by way of mortgage), to hold the same unto the said Esther Tanqueray-Willaume and T. B. Tanqueray-Willaume the younger, their heirs and assigns, according to the natures and qualities thereof respectively. And he bequeathed all his leasehold estates and all other his personal estate (except such part thereof as he had specifically disposed of by his will) unto the said Esther Tanqueray-Willaume and T. B. Tanqueray-Willaume the younger, their executors, administrators, and assigns, according to the natures and qualities thereof respectively. "And I declare that my said real and personal estates are so devised and bequeathed upon the trusts, intents, and purposes, and with, under, and subject to the powers, provisions, and declarations hereinafter expressed and declared concerning the same, that is to say, upon trust to pay the rents, issues, and profits, and the interest, dividends, and annual income of my said real and personal estates unto or permit the same to be received and taken by my said wife during her life, and from and after the decease of my said wife to raise and pay out of my said real and personal estates

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(subject to the proviso for postponing payment of the same hereinafter contained) to my daughter Catherine, the wife of Charles Frederick Murray, Esq., the legacy or sum of £2000 sterling for her sole and separate use, and her receipt alone shall be a sufficient discharge; and to my son Frederick Tanqueray-Willaume, the legacy or sum of £3000 sterling. And I do hereby declare that both the said legacies shall be considered as vested legacies at the time of my decease, notwithstanding the proviso hereinafter contained for postponement of the payment of the same. And as to all the rest, residue, and remainder of my said real and personal estates after the death of my said wife, I give, devise, and bequeath the same unto my said son, T. B. Tanqueray-Willaume the younger, his heirs, executors, administrators, and [*468] *assigns, according to the natures and qualities thereof.

Provided always, and my will is, that my said son, T. B. Tanqueray-Willaume the younger, shall not be obliged or compelled to pay the said legacies of £2000 and £3000 to my said daughter Catherine Murray and Frederick Tanqueray-Willaume at the end of twelve months from the date of the decease of my said wife, but shall be at liberty to pay the same legacies or either of them at any time or times most convenient to himself within two years next after the decease of my said wife, together with interest thereon respectively at the rate of 4 per cent *per annum*, to be computed from the day of the death of my said wife, such interest in the meantime to be paid to them the said legatees half-yearly. . . . And I do hereby appoint my said wife and my son, T. B. Tanqueray-Willaume the younger, executrix and executor of this my will."

The testator died on the 13th of May, 1871, and his will was proved by the executors on the 17th of the following month. On the 14th of June, 1881, they put up for sale by auction a part of the testator's freehold estate. The twelfth condition provided in the usual way that objections and requisitions must be sent in within ten days from the delivery of the abstract, time to be of the essence of the contract, and that in default of such objections and requisitions (if none) and subject thereto (if any) the purchaser should be deemed to have accepted the title. Mr. Landau became the purchaser. An abstract was delivered on the 23rd of June, and requisitions were sent in, all of which were answered to the purchaser's satisfaction, except the following:—"Particulars of

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the legacies directed to be raised and paid by the will of T. B. Tanqueray-Willaume out of his real and personal estate must be given, and the receipts and discharges produced." The vendor, in reply, gave the particulars of the legacies, and stated that they would not be paid till the death of the widow. The purchaser thereupon required that the legatees should join in the conveyance. The vendors' solicitors on the 28th of June replied that the vendors as executors and devisees in trust under a will which charged the testator's debts on his real estate could sell without the concurrence of the legatees, whose concurrence they therefore declined to procure. On the 3rd of August the purchaser delivered the following requisition: "The [*469] power of the vendors as executors and devisees to sell in this case, free from the legacies, would only remain in them if debts of the testator still remain unpaid. Considering that the testator died more than ten years ago, this seems highly improbable to us, and either the purchaser must be furnished with debts still remaining unpaid, or the legatees and the tenant for life must join in the conveyance, and release their respective interests." The vendors' solicitors replied, "The purchaser is not concerned to inquire whether or not debts of the testator still remain unpaid, and lapse of time is no bar to the exercise of the power to sell. *Sabin v. Heape*," 27 Beav. 553.

A meeting then took place, at which the objection was raised that there was no charge of debts, and the question whether the vendors were bound to answer the inquiry as to debts was discussed. After further correspondence, the vendors declined to answer any question as to the testator's debts, but offered (without prejudice) to produce a receipt for the daughter's legacy and give an undertaking to procure a release from the son's legacy, or to invest sums of £2000 and £3000 to indemnify the purchaser against the legacies.

The purchaser took out a summons under the Vendor and Purchaser Act, 1874, asking for a declaration that no charge of debts was created by the will, or if there was, then that the vendors were bound to answer the inquiry whether there remained any debts unpaid.

The summons was adjourned into Court in the Long Vacation.

The summons was heard before Mr. Justice KAY on the 28th of September, 1881. He held that the title was too doubtful to be

forced on a purchaser; and that the costs of the application must be paid by the vendors.

The vendors appealed: and, after argument, the following judgments were pronounced:—

[476] THE MASTER OF THE ROLLS (Sir G. JESSEL):—

This is an appeal from the decision of Mr. Justice KAY, in effect declaring that the vendors cannot make a good title. He arrived at that decision because he thought himself bound by a *dictum* in *Harris v. Watkins*, Kay, 438, 448.

Several questions were argued before us, the two most important of which are, first, whether under this will there is a charge of the testator's debts on his freehold estate; and, secondly, whether, after the lapse of ten years and a half, or thereabouts, there is any presumption that the debts have been paid; so that assuming them to have been paid, the purchaser would take with notice that they had been paid, and that a sale for payment of them was unauthorised.

The decision of the first question involves a decision of some others. The first point to be considered is, under what circumstances does a direction to pay debts charge them upon the testator's freehold estates. I think that the law on that point is correctly stated by Mr. Justice FRY in *Bailey v. Bailey*, 12 Ch. D. 268, 273, in the following passage, which I refer to without giving any opinion as to the rest of the judgment. "I do not think that there is any conflict in the authorities. They appear to me to come to this, that where there is a direction that the executors shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them. The same rule applies whether the executors take the whole beneficial interest, as in *Henrell v. Whitaker*, 3 Russ. 343, or only a life interest as in *Finch v. Hattersley*, 3 Russ. 345 n., or no beneficial interest at all, as in *Hartland v. Murrell*, 27 Beav. 204." That being

the rule, the only question we have to consider in this [*477] case is, first, is there a direction to the executors to pay the debts; and, secondly, is the real estate given to them.

I have not forgotten the argument of the respondents as to the effect of a charge of debts. No doubt it was held in *Doe v. Hughes*, 6 Ex. 223, that a direction that debts should be paid only created

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an equitable charge and did not enable the executors to give the legal estate to a purchaser. Assuming that to be now correct law, and that a charge alone would not enable the executors to pass the legal estate, still, in all cases where there is a devise of the legal estate to the executors, they can give the legal estate, and it appears to me that there is no distinction whatever between a devise of estates to executors, subject to a charge of debts with the implied power of sale which follows from it, and a trust for payment of debts where the legal estate is expressly devised to trustees for the purpose of making such payment. In the case of such a trust, it is perfectly well established that where the death is recent, a purchaser ought not to inquire, and does not inquire, whether there are debts or not, and if he does not inquire, and has no notice that the debts are paid, he is quite safe. In the same way, where there is a charge of debts with an implied power of sale, and the purchaser gets the legal estate, he would be protected by a Court of equity whether there are debts or not, unless he has knowledge that there are no such debts.

The next point is, whether in this case the executors do take the legal estate. That will depend upon the construction of this particular will. I was rather surprised that the point was argued, because there is so much in this will to show that they do. First of all the testator gives and devises to his wife and son, the trustees of his will, all his real estate "whatsoever and wheresoever of or to which I or any other person or persons in trust for me am, is, or are seised or entitled." That is, he gives them not only his freehold estates in which he has the legal estate, but he gives them also the freehold estates of which he has only an equitable estate, to be held upon trusts. It is plain that in so doing he intends to give possession of all his real estate to his trustees, and to hold them to be mere conduit pipes would make nonsense of this part of the will. Then he goes on to say, *to hold the [3478] same to them, their heirs and assigns, and he declares that they shall hold the estates "upon trust to pay the rents, issues, and profits, and the interest, dividends, and annual income of my said real and personal estates unto, or permit the same to be received and taken by my said wife during her life," and then, after her death, to raise and pay certain legacies, and then there is a gift of all the rest and residue to his son, with a power to the son to postpone payment of the legacies for two years after the

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wife's death. Reliance was placed on the words "pay unto or permit the same to be received by," and the case of *Doe v. Biggs*, 2 Taunt. 109 (11 R. R. 533), was cited as an authority to show that the wife would take the legal estate.

In the first place, as has been often observed, the Statute of Uses does not apply to wills. It is used sometimes as a mode of construing wills where it is obvious that the testator, so to say, had the statute in his mind. For instance, if you found a devise to trustees and their heirs to the use of A. B. for life, and after the determination of that estate in his lifetime to the use of trustees during his life to preserve contingent remainders, with remainder to the use of the first and other sons of A. B. in tail, you would say at once that the testator intended his will to operate under the Statute of Uses, and that the legal estate would go to the tenant for life, and the trustees would not take the legal fee. In that way the statute is made use of in construing the will. Now in *Doe v. Biggs* there was nothing more in the will than a gift to trustees to pay to or permit and suffer a lady to take the rents, and the Court of Common Pleas said that she could not be suffered to take the rents unless she had the legal estate, and that she therefore took that estate. This view contradicted the first part of the trust, because the trustees could not pay without having the legal estate, and the Court cut the knot by saying that in a will the last words must prevail, and therefore the first words must be rejected. Such a case as that, decided on such narrow grounds, cannot be treated as establishing any principle applicable to other cases. Here we have a wholly distinguishable case. The wife is one of the trustees, effect therefore can be given to both sets of words; the other trustee having a legal estate as joint [*479] *tenant could pay to her, or he can permit her to receive, which she, as one of the joint tenants, is competent to do. There is, therefore, no need to apply the rule of thumb and say that the latter words are inconsistent with the former, and are to prevail. There is no inconsistency, and consequently the case of *Doe v. Biggs* has no application, and the legal estate remains in the trustees. There is, moreover, a trust to pay legacies, which involves necessarily some estate in the trustees who are to raise and pay them. No doubt this could be done under a power, but the rule is that where there is a devise to trustees and their heirs, and they have some duty to perform requiring the legal estate, they

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take the legal estate and not merely a power. Then reliance was placed upon the power to the son to delay payment, and the gift to the son of the residue, but the gift to the son of the residue is not a new gift of the real estate, it is only a gift of the equitable interest in remainder, and the power to the son to delay the payment is not inconsistent with his being trustee, for in the case put he would be the surviving trustee. It is after the death of the wife, and he being the surviving trustee there is nothing to show that he is not to pay as trustee. For these reasons, it appears to me to be clear that the trustees take the legal fee as joint tenants.

Then, as they take the legal estate, it is utterly immaterial whether or not they take the beneficial interest. If they take the legal estate in trust for other people, the trust for other people does not negative the intention that they should sell to pay debts, and why should the trust for themselves negative it? It seems to me, therefore, that when once you get to the rule that a direction to pay debts confers upon the executors a power of sale over real estate devised to them as joint tenants, there is nothing to take this case out of that rule.

The case then stands thus. A direction to "my executors to pay my debts" has been held to mean a direction to them to pay out of the personal estate, but if it is followed by a devise of real estate to the executors, either as such or in their own names, it is a direction to them to pay out of that estate as well as out of the personal estate, and the real estate is charged. In the present case the legal estate is vested in the executors. We have, therefore, * here a good charge of debts, a good power of [*480] sale, and a good legal estate.

The only remaining point is what period of time is sufficient to raise a presumption that the debts have been paid. Now, upon that point and on that point only I differ from *Sabin v. Heape*, 27 Beav. 553. I think it is clear that ten years and a half are not sufficient, but, as has been said, a line must be drawn somewhere. The question is where? In *Sabin v. Heape* the late MASTER OF THE ROLLS held that the lapse of twenty-seven years did not raise the presumption. I think that period too long. In *Forbes v. Peacock*, 12 Sim. 528, the period was twenty-five years, which the VICE-CHANCELLOR appears to have considered too long. I think it desirable that a rule should be laid down upon which parties may act without having to come to a Court of equity, and in my

opinion the reasonable period is twenty years. The reason why I say twenty years is this, — that is the period of limitation for a specialty debt, and we know as a fact that most landowners owe mortgage debts. It therefore seems reasonable to say that after the lapse of twenty years, which is sufficient to bar mortgage debts and all other specialty debts, there is a presumption that the debts are paid, especially when you find a beneficiary in the enjoyment of the estate, — a circumstance mentioned by Lord St. LEONARDS in *Stroughill v. Anstey*, 1 De G. M. & G. 654. In this case I may say it is not so, because the widow is a trustee, and therefore it cannot be said that her being in possession of the estate shows anything: but where you find a beneficiary in possession and twenty years have elapsed, I think it is fair to presume that the debts have been paid, and in such a case I think that a purchaser is bound to inquire.

It follows from what I have said that in my opinion the title is good, and the appeal ought to be allowed.

BRETT, L.J. :—

In this case there has been a contract for the purchase and sale of land, and the purchaser made the following requisition: "The power of the vendors as executors and devisees to sell in this case free from the legacies would only remain in them if debts of the testator still remain unpaid. Considering that the testator [* 481] died * more than ten years ago this seems highly improbable to us, and either the purchaser must be furnished with debts still remaining unpaid, or the legatees and the tenant for life must join in the conveyance and release their respective interests." The answer was: "The purchaser is not concerned to inquire whether or not the debts of the testator still remain unpaid." Upon that answer the purchaser assumes the right not to accept the title. The question raised therefore is, whether that requisition is a material one or not. It is argued on the one side that it is material, because it is said if there are no debts in existence then the purchaser will have a bad title to the property if he accepts it. On the other side it is said that it is wholly immaterial to him whether there are debts or not, because whether there are debts or not the title given to him will under the circumstances of the case be equally good.

The first question is whether the testator's debts were charged

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upon his real estate, and that depends upon the construction of the will.

Now, in order to help us to construe this will a great number of cases were cited on one side and the other, but whenever one of those cases was disagreeable to the person against whom it had been cited, he answered by saying it is a decision upon another will with provisions different from those of the present will, and therefore can be no authority for the construction of this will. To some extent all reported cases upon the construction of documents are open to that objection, but still they are useful. The only way in which the Court can make them useful is to see whether there can be elicited from them any rule of construction applicable to other cases in which similar words occur. It is of no use, to my mind, to discuss such cases, and to say whether one would have agreed with the learned Judges who decided them as to every part of the case. The only use of them is to see whether from the grounds given for the decision a rule of construction can be deduced, and if there are cases laying down a rule of construction which has been in the books for a number of years and has never been disputed, it ought, as it seems to me, to be assumed that in subsequent conveyances and wills it was intended to use the expressions referred to in those cases in the sense in which they have been construed in the cases. Now, it seems to me that *a reasonable and fair general rule of construction can [* 482] be deduced from the decided cases, and that this rule is well stated in *Hartland v. Murrell*, 27 Beav. 204, 206. There the MASTER OF THE ROLLS says: "I am of opinion that when a testator devises all his real estate to his executors and directs them to pay all his debts, that constitutes a charge on the real estate, although they take no beneficial interest in it." But then it was said that *Wasse v. Heslington*, 3 My. & K. 495 (41 R. R. 110), was inconsistent with that rule. On one side we were asked to entirely disagree with *Wasse v. Heslington*, and on the other side we were asked to accept *Wasse v. Heslington* and to disagree absolutely with *Hartland v. Murrell*. Upon hearing those two cases read it seemed to me that you might extract from them a very good rule: viz., that where a gift is in the form mentioned in *Hartland v. Murrell* the debts are charged upon the real estate, unless upon other parts of the will a contrary intention clearly appears. The rule, as stated in *Hartland v. Murrell*, with that

proviso or condition attached to it, seems to me to be consistent with the authorities, and to be well stated in the passage from *Bailey v. Bailey*, 12 Ch. D. 273, which was read by the MASTER OF THE ROLLS. It seems to me that wherever a testator devises all his real estates to his executors and directs them to pay his debts, the debts are charged on the real estate, whatever may be the trusts declared of that real estate, unless upon the whole will you can clearly find a contrary intention. It was argued that this case was not brought within the canon, because in this case the real estate was not given to the executors, in support of which *Doe v. Biggs*, 2 Taunt. 109, was relied on. I am not at all inclined to dispute the authority of that case, but it appears to me to have no application to the present. Here it appears to me that the trustees take the legal estate, subject to certain trusts imposed upon it, in their hands. Therefore the case is clearly to my mind within the canon, and I can see nothing in it to show a clear intention to the contrary. It is not therefore within the exception or proviso, it is within the original rule, and the debts are charged upon the real estate.

Then it is said that after the lapse of ten years the purchaser must in prudence ask whether there were debts existing, because if there were not his title would be bad. The question [*483] * whether the purchaser's title would be bad if there were not in fact any debts, supposing the time which has elapsed not to be too long, is determined by *Stroughill v. Austey*, 1 De G. M. & G. 635, which is an authority for saying that if there is a charge of debts upon the property, then, if the purchaser has no knowledge that there are no debts, he has, except under peculiar circumstances, a right to assume that there are debts, and that his title is good whether there are or are not debts in fact. So far, therefore, from its being prudent in him to ask this question it is imprudent to ask it, unless there has been sufficient lapse of time to call upon him to make that requisition.

That raises the final point, whether in this case there had elapsed a sufficient time to put the purchaser on inquiry. It seems to me that it is only after a considerable time that he is bound to ask, and the question is what time is sufficient? Unless there be some particular circumstances in the case it seems to me that, as a general rule, the question should not be asked within twenty years, but that after twenty years it will be right to ask the question. Therefore, it seems to me that in the present case there

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was no occasion for the purchaser to ask the question. It was therefore an immaterial question which the vendors were not bound to answer.

Therefore, I am of opinion that there is not that kind of doubt in this title which would justify the Court in saying that it cannot be forced upon a purchaser, and the order ought to be that this purchaser is bound to complete.

HOLKER, L.J. : —

I am of the same opinion.

Marten, Q.C., asked that the order might be made without costs, the will being obscure. He referred to *Osborne to Rowlett*, 13 Ch. D. 774.

The Court ordered the purchaser to pay costs.

ENGLISH NOTES.

In both of the above principal cases it appears that the legal estate was vested in the executors. Where the legal estate is vested in another, the rule does not necessarily give the executor power to convey the legal estate to the purchaser. In *Colyer v. Finch* (1856), 5 H. L. C. 905, 922, Lord CRANWORTH, L. C., says: "Where there is a general charge of debts, and no estate given, it may be that as against the heir-at-law, the executors may sometimes, perhaps always, possess impliedly a power to convey the legal estate in order to raise the money to satisfy the charge; but that doctrine certainly does not apply to a case where the estate is devised to others or to another, charged with certain payments of debts or legacies; there that money is to be raised through the instrumentality of a sale by the devisee, and that devisee is the person and the only person that can make a legal title."

By the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 14, in the case of wills coming into operation after the 13th of August, 1859, where the testator has charged his estate with the payment of debts or legacies, and has devised the estate so charged to a trustee who is not the executor, the trustee to whom the estate is so devised is empowered to sell. Where there is no such express devise, the power of the executor to sell is expressly confirmed by sect. 16 of the same Act; but this does not render it unnecessary to get in any outstanding subsisting legal estate.

In *Corser v. Cartwright* (H. L. 1875), L. R. 7 H. L. 731, it was held that an executor, who is also a devisee of an estate charged with the payment of debts, may be presumed by a *bonâ fide* purchaser or mort-

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gagee of that estate to be dealing with it for the purposes of the administration, and may give a valid title to it, without the purchaser being bound to see to the application of the money.

The limit of twenty years, suggested in the latter principal case as the period during which the presumption of the right of the executor to sell continued, was adopted in the Irish case of *In re Molyneux and White* (1884), 15 L. R. Ir. 383, where it was held that the presumption did not exist after the period of thirty-seven years.

In another Irish case, *In re Ryan and Caranagh* (1885), 17 L. R. Ir. 42, a testator had left all his property to A. and B. in trust to pay his debts, and subject thereto in trust for his wife and children in equal shares, and appointed his trustees and C. his executors. B. alone proved the will, and seventeen years after the testator's death put up a leasehold property for sale. The purchaser objected to the title on the ground that a good title could not be made without the concurrence of A. and the beneficial legatees. It was held that B., as sole executrix, had a good title to sell; and notwithstanding the lapse of seventeen years, was not to be presumed to have assented to the joint bequest to A., or to the bequest to the beneficiaries.

In both these Irish cases the case of *In re Tanqueray-Willaume and Landau* was cited and followed.

In the case of *In re Whistler and Richardson* (1887), 35 Ch. D. 561, 565, 56 L. J. Ch. 827, 57 L. T. 77, 35 W. R. 662, it was observed by KAY, J., that there was no authority for the proposition that the power of the executor to sell personal estate was to be considered at an end after twenty years. And in *In re Venn and Furze's Contract*, 1894, 2 Ch. 101, 63 L. J. Ch. 303, 70 L. T. 312, 42 W. R. 440, the judgment of KAY, J., in *In re Whistler and Richardson*, was considered by STIRLING, J., to be an express decision that the twenty-years rule laid down in *In re Tanqueray-Willaume and Landau* did not apply to the case of an executor selling leaseholds of the testator, and followed the decision in that sense accordingly.

AMERICAN NOTES.

That an executor has implied authority to sell the real estate of the testator whenever it appears from the whole purview of the will to have been his intention that it should be sold, is clear. American cases illustrating the circumstances under which such a power will be implied, are collected in 1 Williams on Executors, 7th Am. ed. 797-798; 87 American Decisions, 209; 11 Am. & Eng. Encycl. of Law, 2nd ed. 1043.

In America the English rule that a mere charge of debts on real estate by the testator is enough to imply a power of sale in the executor, has not been generally adopted. *Owen v. Ellis*, 64 Missouri, 77; *Snedekers v. Allen*, 2 New

No. 20. — London Chartered Bank of Australia v. Lempriere, 42 L. J. P. C. 49. — Rule.

Jersey Law, 35, 45 (but see *Dovey v. Ruggles*, 25 New Jersey Eq. 35); *Matter of Fox*, 52 New York, 530; 11 American Reports, 751; *Dunn v. Keeling*, 2 Devaux Law (N. Car.), 283; *Worley v. Taylor*, 21 Oregon, 589; 28 American State Reports, 771. See also 11 Am. & Eng. Encycl. of Law, 2nd ed. 1045.

The reason for the prevailing American view is thus stated in *Matter of Fox*, *supra*, at p. 537: "The statute in this state has provided an ample remedy for creditors for the collection of their debts out of the real property of a decedent, and the implication of a power of sale in executors, from a simple charge of the debts upon the lands, is unnecessary and ought not to be indulged."

Where the executor does have a power of sale for the payment of debts, the purchaser is ordinarily not bound to inquire whether there are debts outstanding at the time of the sale. *Wright v. Zeigler*, 1 Georgia, 324; *Smith v. Henning*, 10 West Virginia, 596. But see *Mc'own v. Terrell*, 9 Texas Civ. App. 66.

Circumstances, however, such as the lapse of a long time since the testator's death, may be sufficient to put the purchaser on his guard. Thus, in *Rutherford v. Clark*, 4 Bush (Ky.), 27, in holding that, under the circumstances, a purchaser from an executor should not be protected, the Court laid stress on the fact that forty years had elapsed since the testator's death. Whether, in America, the line would be drawn at twenty years, as in the second principal case, *quere*.

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v. LEMPRIERE.

(1873.)

RULE.

WHERE personal property is settled to the separate use of a married woman for life, with remainder as she should, notwithstanding coverture, by deed or will appoint, with remainder to her executors or administrators, this is in effect the same as if it were settled to her separate use absolutely.

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42 L. J. P. C. 49-60 (s. c. L. R. 4 P. C. 572; 29 L. T. 186; 21 W. R. 513).

Feme Covert. — Contract by. — Liability of Separate Estate. — General [49]
Engagement.

A *feme covert* having property settled to her separate use for life, with remainder as she should, notwithstanding coverture, by deed or will appoint,

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with remainder to her executors or administrators, opened two accounts with her bankers, a private and an administration account, and directed the bankers, by the joint letter of herself and her husband, to consider any overdraft on her private account secured by the administration account. The administration account was subject to the trusts of the settlement. At her death the private account was overdrawn: — *Held*, that she had contracted so as to bind her separate estate, and that the bankers had a lien on the administration account in respect of the overdrawn private account.

This was an appeal from a decree of the Supreme Court of the Colony of Victoria.

The appellants were a company carrying on the business of banking in the Colony of Victoria.

The respondents were the trustees of a settlement and the executors and trustees of the will of Anne Young Aitkin, deceased.

[53] The appellants, the bank, had certain dealings and transactions with one Anne Young Aitkin and her husband. She was the widow and administratrix of one Jeremiah George Ware, deceased, who had died (as far back as October, 1859) intestate, possessed of property, real and personal, to a very large amount.

A suit was instituted in the Supreme Court of Victoria, for the purpose of administering that estate, and, in the course of that suit, a receiver and manager of the rents and profits of the real estates of the intestate was appointed, but the administration of the personal estate by the administratrix was not otherwise interfered with by the Court.

Mrs. Aitkin, then Mrs. Ware, employed the appellants as her bankers, and had two accounts with them: one, her private account; the other, her administration account opened with her as Anne Ware, administratrix. The receiver kept his account with the same bank.

In March, 1862, she intermarried with Mr. Aitkin. Shortly after her marriage, she and her husband called at the bank, and at their request the two accounts were transferred to her by her new name, and on that occasion she signed a letter as follows:—

GELLONG, April 4, 1862.

DEAR SIR, — Herewith I send you two cheques amounting to £1363 3s. 7d. and £4434 18s. 7d., drawn by me on my private account and administration account, and hereby request you to

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transfer the amounts to accounts respectively, to be opened in your bank in the name of * "A. Y. Aitkin" and [*54] "A. Y. Aitkin, Administratrix." Any cheques outstanding, or any bills drawn, accepted or indorsed "A. Y. Ware" or "A. Y. Ware, Administratrix," to be placed to the new accounts respectively. And you will consider any private overdraft of mine secured by my administration deposits in your hands, and please to recognise Mr. John Ware's signature as formerly on the administration account.

I am, yours truly, A. Y. AITKIN.

The Manager, London Chartered Bank, Geelong.

And the husband signed his name to the words, "I consent," written thereunder.

Afterwards, and up to the time of Mrs. Aitkin's death, in June, 1867, very large sums were drawn out by her on her private account; and the same was overdrawn at that time to the extent of £13,438. But during the same period very large sums were paid in to the administration account, which were from time to time placed on deposit at interest with the bank. Amongst the sums so deposited were two sums of £6000 and £8000, which are especially the subject of this suit. After the death of Mrs. Aitkin, the bank claimed the right to apply these sums to the overdraft on the private account; and the question was whether they were entitled so to apply those moneys.

The judgment of the Court (Lord Justice JAMES, Sir BARNES PEACOCK, Lord Justice MELLISH, and Sir MONTAGUE SMITH) was delivered by

Lord Justice JAMES, who, after stating the case, and adverting to the evidence upon the question whether the bank had notice of the settlement, proceeded as follows:—

The appellants (the bank) made and make the following [*55] case:—

We are, they say, creditors of a married lady having a separate estate, and a power for our purpose equivalent to a separate estate; and the lady having exercised that power by will in favour of volunteers, we are entitled to be paid our debts out of the moneys appointed in priority to the volunteers.

The appellants rely on the law as laid down by the Lord Jus-

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tice TURNER, in *Johnson v. Gallagher*, 3 De G. F. & J. 513, 30 L. J. Ch. 298:—

" Since the case of *Jones v. Harris*, 9 Ves. 493, there is not, so far as I am aware, any case opposed in any degree to the doctrine of the separate estate being liable for general engagements, except the case of *Aguilar v. Aguilar*, 5 Madd. 414, which followed *Jones v. Harris*, and the *dicta* of Sir JOHN LEACH in *Greatley v. Noble*, 3 Madd. 79, and *Stuart v. Lord Kirkwall*, 3 Madd. 387; and, on the contrary, the cases of *Murray v. Barlee*, 3 Myl. & K. 209, *Owens v. Dickenson*, Cr. & Ph. 48, *Burke v. Taite*, 19 Ir.

Eq. L. R. 467, *Vaughan v. Vanderstegen*, 2 Drew. 165, [*56] 23 L. J. Ch. 793, *and *Wright v. Chard*, 4 Drew. 673,

29 L. J. Ch. 82, contain very decisive *dicta* in favour of such liability. The weight of authority, therefore, seems to me to be in favour of the liability. I think, too, that the principle on which all the cases proceed, that a married woman in respect of her separate estate is to be considered as a *feme soli*, is also in favour of it; and upon the whole, therefore, I have come to the conclusion that not only the bonds, bills, and promissory notes of married women, but also their general engagements, may affect their separate estates, except as the Statute of Frauds may interfere where the separate property is real estate. I am not prepared, however, to go the length of saying that the separate estate will, in all cases, be affected by a mere general engagement. The cases of *Jones v. Harris* and *Aguilar v. Aguilar* show that the engagement which, if the married woman was a *feme sole*, the law would create for repayment of the consideration of a void annuity would not affect it. It seems to follow that, to affect the separate estate, there must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be, must, I think, depend in each case upon the circumstances. What might affect the separate estate in the case of a married woman living separate from her husband might not, as I apprehend, affect it in the case of a married woman living with her husband. What might bind the separate estate, if the credit be given to the married woman, would not, as I conceive, bind it if the credit be not so given. The very term 'general engagement,' when applied to a married woman, seems to import something more than mere contract, for neither in law nor in equity can a married woman be bound by contract merely. *Aylett*

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v. *Ashton*, 1 Myl. & Cr. 105, 5 L. J. (N. S.) Ch. 71. According to the best opinion which I can form of a question of so much difficulty, I think, that in order to bind the separate estate by a general engagement, it should appear that the engagement was made with reference to and upon the faith or credit of that estate, and that whether it was so or not is a question to be judged of by this Court upon all the circumstances of the case." . . . "The separate estates of married women being thus far bound by their debts, obligations, and engagements, it has next become a question how far those debts, obligations, and engagements affect the *corpus* of the property, where the married woman has a limited interest only, as, for instance, a life estate with a power of appointment. The cases on this subject may, as it seems to me, well be classed under three heads: first, where the power of appointment has been general, by deed or writing or by will; secondly, where it has been by will only, and the power has been exercised; and thirdly, where there has been a limitation in default of appointment and the power has not been exercised. In cases falling under the third class, there cannot, as it seems to me, be any reasonable doubt that the debts and engagements of the married woman cannot prevail against the parties entitled in default of appointment, and the case of *Nail v. Punter*, 5 Sim. 555, impliedly decides that point. In cases falling under the second class, where the power of appointment is by will only and has been exercised, but not for creditors, the authorities do not appear to me to be consistent. In *Norton v. Turrill*, 2 P. Wms. 144, as explained in *Sockett v. Wray*, 4 Bro. C. C. 483, the exercise of the power by the will of the married woman seems to have been held to have let in a bond-creditor against the appointees under the will; and in *Hughes v. Wells*, 9 Hare, 749, I seem to have intimated that this might be the effect of the exercise of the power, as in other cases of the exercise of the general power of appointment by will, and certainly not upon the ground that power is property. But the Vice-Chancellor KINDERSLEY, in whose judgment I have quite as much confidence as in my own, seems to have dissented from *Hughes v. Wells* in the case of *Vaughan v. Vanderstegen*, and I observe that Sir WILLIAM GRANT has treated the point as doubtful in *Heatley v. Thomas*, 15 Ves. 596. I say no more, therefore, upon this point than that it may be considered as open. But in [*57] cases falling under the first class, where the power of

appointment has been by deed or writing or will, the Courts have certainly held the *corpus* of the property to be subject to the debts and engagements of the married woman."

It is said, indeed, that the Lord Justice KNIGHT BRUCE did not concur with his colleague, and that Lord ST. LEONARDS has expressed an opinion that the Lord Justice KNIGHT BRUCE'S view was the more correct. It will be observed, however, that the point of difference was as to whether a general engagement could create the obligation, and not at all as to the second point as to how far the obligation, if it exists, binds the *corpus* of property subject to a power of appointment in the married woman.

The term "general engagement" is an ambiguous and misleading one. If it is meant merely to say that goods sold to a married woman in the ordinary course of domestic life, that contracts expressed to be made by her in respect of property not her separate estate, *e. g.*, for buying or selling or letting or hiring a house, do not necessarily impose a liability to be satisfied out of separate estates which she may happen to have, in that sense, and to that extent, the proposition that her separate estate is not liable to her general engagements is quite accurate. But that does not affect the rule as laid down by Lord Justice TURNER as to general engagements, as to which it appears that they were made with reference to and upon the faith or credit of the separate estate. It will be useful to refer to Lord LANGDALE'S expressions, quoted by the Lord Justice TURNER:—

"It is perfectly clear that when a woman has property settled to her separate use, she may bind that property without distinctly stating that she intends to do so. She may enter into a bond, bill, promissory note, or other obligation, which, considering her state as a married woman, could only be satisfied by means of her separate estate, and therefore the inference is conclusive that there was an intention, and a clear one, on her part, that her separate estate, which would be the only means of satisfying the obligation into which she entered, should be bound. Again, I apprehend it to be clear that where a married woman having separate estate, but not knowing perfectly the nature of her interest, executes an instrument by which she plainly shows an intention to bind the interest which belongs to her, then, though she may make a mistake as to the extent of the estate vested in her, the law will say that such estate as she may have shall be bound by her own act."

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It would be very inconvenient that a married woman with a large separate property should not be able to employ a solicitor or a surveyor, or a builder, or tradesman, or hire labourers or servants, and very unjust, if she did, that they should have no remedy against such separate property.

It is true that, in *Shattock v. Shattock*, L. R. 2 Eq. 182, 35 L. J. Ch. 509, the MASTER OF THE ROLLS expressly overruled the judgment of the Lord Justice TURNER, and held that even a promissory note given by a married woman living separate and apart from her husband, and having property settled to her separate use for life, with a power to appoint the same by deed or will, and appointing it by will, was not a debt payable out of the property so appointed. In that judgment he bases his dissent from the Lord Justice on the ground that the authorities cited by the latter do not warrant his conclusion.

Their Lordships are not able to concur in that view of the authorities, and have arrived at the conclusion that Lord Justice TURNER's judgment is expressed with his usual accuracy.

One of the cases, *Heatley v. Thomas*, when carefully examined, is a direct authority for the Lord Justice's proposition. There, a bond creditor of the married woman sought payment out of property appointed by her will. A doubt was raised in that case on the true construction of the settlement as to whether it did in fact give her a power of disposal by deed or otherwise *inter viros* as well as by will, and that doubt being resolved in the affirmative, the plaintiff obtained the decree sought for by him. Sir WILLIAM GRANT's observations are these:—

“The question is, whether this was *separate property to [*58] all intents and purposes. In *Sockett v. Wray*, Lord ALVANLEY did not consider a married woman who had only a power of appointment by will, as having separate property; distinguishing that case from *Norton v. Turrill*, where the creditor was allowed to resort to the separate property after the death of the wife, as she had a power of appointing either by deed or will. Upon the question in *Sockett v. Wray*, whether the wife could give the property to her husband, Lord ALVANLEY held that she could not; that she could not affect it in any way but by a revocable instrument; and the bond was an instrument not revocable. If this was absolute separate property in Mrs. Johnson, upon the plaintiff's construction of the deed, that takes it out of the case of

Sockett v. Wray, and brings it to that of *Hulme v. Tennant*, W. & T. L. C."

In that case it is obvious that Sir WILLIAM GRANT considered that property settled to a married woman's separate use for life, with power to dispose of it by deed or will, was in effect separate property. That case was in one respect a strong one, as there was no gift over except in the event of her dying in her husband's lifetime. She survived him, and therefore, irrespective of the settlement, became again possessed of the property in her original right; so that upon the death of her husband, the property stood settled to herself for life, remainder as she should by deed or will appoint, remainder to herself absolutely. But having property over which at the time of making the bond she had absolute power of disposition, notwithstanding her coverture, the bond by which, notwithstanding her coverture, she had bound herself, was decreed to be satisfied out of it.

In the present case it is to be noted that the gift is to the married woman for her separate use for life, with remainder, as she should, notwithstanding her coverture, by deed or will appoint, with remainder to her executors or administrators. Their Lordships are satisfied that on the weight of authority and on principle they ought to treat this as what, in common sense, and to common apprehension, it would be, an absolute gift to the sole and separate use of the lady. The words are an expansion and expression of what would be implied in the word sole and separate use; and they conceive themselves at liberty to hold that such a form of gift to a married woman, without any restraint on anticipation, vests, in equity, the entire *corpus* in her for all purposes, as fully as a similar gift to a man would vest it in him.

In the Supreme Court of Victoria, the question appears to have been discussed and determined mainly on the applicability or non-applicability of the case of *Taughan v. Vanderstegen*, which it is necessary therefore to consider. In that case the married woman had only power to appoint by will. The VICE-CHANCELLOR held that a creditor was not entitled to be paid out of property appointed by such will, but on a second hearing, held that where a fraud had been practised on the creditor, he was so entitled. His reasoning was shortly this: the fraud created an equitable demand which would have been enforced against any property of the married woman, and that being so it would, like a man's debt,

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be payable not only out of her own assets, but in aid of them out of any property which she had a general power to appoint, and had actually appointed.

It is not easy to see on what principle the fraud could alter the nature of the property subject to appointment or affect the appointees. It is easy to see how fraud might make that a debt to which the married woman would be in equity liable notwithstanding her coverture, and that there being such a liability or debt, equity would deal with any property to which she was notwithstanding coverture absolutely entitled, and any property over which she had a general power of appointment, exactly as it would do in the case of a man or *feme sole* dying indebted. Given the relation of debtor and creditor in equity, all the consequences of such relation would appear to follow just as if there were no coverture in the case.

But the case of *Vaughan v. Vanderstegen* was before the Lord Justice TURNER in *Johnson v. Gallagher*, and it was with the full knowledge of that case, and after having had the advantage of well weighing the judgment of Vice-Chancellor *KIN- [*59] DERSLEY, that the LORD JUSTICE laid down the propositions which have been previously cited, and the concurrence of their Lordships with which has been above stated.

It appears to their Lordships therefore that it was not necessary for the appellants to make out a case of fraud. All that was necessary was to show that the married woman intended to contract so as to make herself, that is to say, her separate property, the debtor, and upon the facts of this case that does not appear to be open to any substantial doubt. Assuming for the moment that the letter did not operate as a defective execution of her power, it at all events showed unequivocally that she contracted that her interest in the intestate's estate, *i. e.*, her separate property, should be liable to the debt.

In the Supreme Court it was considered sufficient to say that the case was based entirely on fraud, and that the fraud not being proved the bill ought to be dismissed with costs. Their Lordships agree that the fraud was not proved. They are satisfied that the non-mention of the settlement (if it was not mentioned) was perfectly honest. The lady and her husband well knew that what she had reserved to herself would be an ample security for anything which she was likely to overdraw pending the winding up of

the estate, which probably was protracted for many more years than they contemplated, and the lady and her husband (as their Lordships are well satisfied) honestly intended to give and did give that ample security.

It may be right, in order to avoid any possible misapprehension of the judgment of the Supreme Court, to say a few words on the effect of a charge of fraud made and not proved. If the case is based on the fraud, the failure to prove it must be, like the failure to prove any other essential ingredient, fatal. But if, striking out the charge of fraud, there is sufficient equity stated and proved, if, as in this case, the fraud is thrown in by way of subsidiary answer to the counter-case of the respondent, it is a matter only affecting costs.

Their Lordships are of opinion that on each of the several grounds stated above, the appellants are entitled substantially to the relief they have asked.

The injunction asked was probably not necessary, as it is difficult to see how any action at law could be sustained; but it was however proper, as the action at law could not have properly tried the real questions between the parties, which were as to their respective priorities over the separate trust estate of a *feme covert*. As to the costs of the proceedings, of course, the costs paid by the appellants must be repaid to them. As to their own costs, their Lordships are of opinion, having regard to the nature of the suit and claim, that the proper order will be that they should add their costs to their debt.

Their Lordships will therefore humbly recommend to Her Majesty as follows:— That the orders of the Supreme Court of Victoria ought to be discharged, and in lieu thereof a declaration made that the share to which the said Anne Young Aitkin (formerly Ware) was entitled as widow of the said intestate in his personal estate, to the extent of the £15,000 mentioned in the settlement, and the moneys payable in respect of her dower in his real estate, are liable to make good the sum due to the appellants, with interest as aforesaid in respect of the said overdraft. And that until such overdraft is fully paid, the appellants have a lien upon and are entitled to retain the deposits of £8000 and £6000, as representing part of the said sum of £15,000, as security for the same.

That an account be taken of what was due in respect of the over-

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draft in the bill mentioned for principal and interest up to the time when the deposited sums of £8000 and £6000 were carried to a suspense account, and a like account of principal and interest on those sums up to the same date, and the balance at that date, ascertained. That the taxed costs of the appellants of the suit in the Courts below and of this appeal be added to or set off against such balance, as the case may be. Any balance due from the bank to be paid to the legal personal representative of Mrs. Aitkin; and, as to any balance due to the bank, they are to be at liberty to apply, as they may be advised in the administration suit, for payment out of her ^{*}share of the intestate's estate, [^{*}60] to the extent of the said sum of £15,000 and the arrears of dower. And the decree is to be without prejudice as to how, as between the persons interested under the settlement and will, and as respects any other estate of Mrs. Aitkin, the debt of the bank ought to be borne.

That the costs paid by the appellants to any parties be repaid to them.

ENGLISH NOTES.

The effect of this rule must be considered in connection with the rule under No. 5 of "Contract," 6 R. C. 56 *et seq.* The observation of BRETT, L. J., in his judgment in *Pike v. Fitzgibbon*, 6 R. C. 67, shows that the rule has a very limited application.

AMERICAN NOTES.

In *Brunson v. Hunter*, 2 Hill Eq. (S. Car.) 483, where A. deeded property, subject to a life interest in himself, to such persons as his wife should by deed or will appoint, and, in default of appointment, to her and her heirs, it was held that, upon A.'s death, his wife took an estate in fee, and that the power was merged in it.

Chancellor KENT, in speaking of the doctrine of merger of the power in such cases, said: "This seems to be the good sense and reason of the thing, for the separate existence of the power appears to be incompatible with the ownership of the fee. But the weight of authority is decidedly in favor of the conclusion that the power is not extinguished, and may well subsist with and qualify the fee." 4 Kent's Commentaries, *348.

Where a life estate is given to one, with a general power of appointing the remainder, and the remainder in default of appointment is limited to a third party or not disposed of at all, the power does not enlarge the life estate to a fee. *Ward v. Amory*, 1 Curtis (U. S. Circ. Ct.), 419, 425; *Rubez v. Barnett*, 12 Missouri, 3; *Lewis v. Pitman*, 101 id. 281; *Harrison v. Battle*, 1 Devereux & Battle Eq. (N. Car.) 213; *Burleigh v. Clough*, 52 New Hampshire, 267; 13 American Reports, 23.

No. 21. — Phillips v. Cayley. — Rule.

But "a devise of an estate generally, or indefinitely, with a power of disposition over it, carries a fee." 4 Kent's Commentaries, *319. As was said in *Fairman v. Beal*, 14 Illinois, 244: "If land be devised to a person, with a general power to dispose of the same, an estate in fee simple passes. Such a power of disposition amounts to an absolute gift of the property. But if it be devised to a person for life, with power to dispose of the reversion, an estate for life only passes: and if the devisee dies without disposing of the reversion, it goes to the heir of the devisor. The creation of the life estate controls the operation of the power, and prevents it from enlarging the estate to a fee." See *Funk v. Eggleston*, 92 Illinois, 515; *Green v. Sutton*, 50 Missouri, 186; *Wead v. Gray*, 78 id. 59; *Tremmel v. Kleiboldt*, 6 Missouri App. 549; 18 Amer. & Eng. Encycl. of Law, 1st ed. 916-918.

The New York statutes contain the following provisions on this subject (Rev. Stats. Pt. II. ch. 1, t. 2, sects. 81-85):

"Where an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate, for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed, or the lands should not be sold for the satisfaction of debts.

"Where a like power of disposition shall be given to any person to whom no particular estate is limited, such person shall also take a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors and purchasers.

"In all cases, where such power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee shall be entitled to an absolute fee.

"Where a general and beneficial power, to devise the inheritance, shall be given to a tenant for life or for years, such tenant shall be deemed to possess an absolute power of disposition, within the meaning and subject to the provisions of the three last preceding sections.

"Every power of disposition shall be deemed absolute, by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee, for his own benefit."

No. 21. — PHILLIPS v. CAYLEY.

(C. A. 1889.)

RULE.

A TRUST for such persons as the settlor should appoint . . . "by will expressly referring to the power" is not a general power in the sense of a "power to appoint in any manner he may think proper" within the 27th section of the Wills Act, 1837 (1 Vict. c. 26).

No. 21. — **Phillips v. Cayley**, 43 Ch. D. 222, 223.

Phillips v. Cayley.

43 Ch. D. 222-235 (s. c. 58 L. J. Ch. 569; 61 L. T. 195).

Execution of Power. — Exclusion of Will. — Express Reference. — General [222]
Bequest. — Wills Act, s. 27 [Revised Ed. Statutes, vol. viii. p. 35].

Under an indenture of settlement, trustees were to hold a sum of railway stock for such persons as the settlor should by writing under his hand (not being a will or codicil), or by a will or codicil expressly referring to the power, appoint.

The settlor by will bequeathed his personal estate to trustees, not making any reference to the power:—

Held (by KEKEWICH, J., and by the Court of Appeal), that this bequest did not operate under sect. 27 of the Wills Act (1 Vict. c. 26), as an execution of the power.

By an indenture of settlement dated the 4th of June, 1884, H. R. Phillips declared that the trustees therein named should stand possessed of £7060 preference railway stock, “upon trust for such person or persons and for such purposes as the said H. R. Phillips shall at any time or times, or from time to time, by writing under his hand (not being a will or codicil), or by a will or codicil expressly referring to this power, appoint. And in default of and subject to any appointment under the power hereinbefore contained” upon the trusts thereafter mentioned.

H. R. Phillips died on the 10th of September, 1886, having by his will dated the 12th of June, 1879, given and bequeathed his personal estates and effects to his three trustees and executors upon trust for conversion, and for payment of his funeral and testamentary expenses, debts, and legacies. The testator made four codicils to his will (the last dated the 7th of June, 1884), which did not alter the above-mentioned general bequest of personal estate, except by varying the trustees and executors. Neither the will nor the codicils contained any reference to the power in the settlement.

G. Phillips and H. Phillips, who claimed under the settlement in default of appointment, issued an originating summons

asking that it might be declared that the will of H. R. [223] Phillips did not operate as an exercise by him of the power of appointment reserved to him by the settlement; and that the trusts of the settlement might be carried into execution under the direction of the Court.

The summons was heard by Mr. Justice KEREWICH on the 19th and 20th of June, 1889.

Warrington, Q.C., and Warrington, for G. Phillips and H. Phillips; referred to *In re Marsh*, *Mason v. Thorne*, 38 Ch. D. 630, and *Charles v. Burke* (12th Dec. 1888), 60 L. T. 380, where a judgment had been pronounced by Mr. Justice KAY, as follows:—

In this case the testator made a will on the 12th of June, 1879, by which he did not affect to exercise any power of appointment of his leasehold property and personal estate and effects. On the 8th of January, 1880, he makes a settlement, by which he is desirous of making provision for Harriett Charles, widow, “and for that purpose has transferred, or will shortly after the execution of the settlement, cause to be transferred into the names of Sandford and Burke the sum of £1766 13s. 4d., £3 per cent Consolidated Bank Annuities to be held by them upon the trusts hereinafter declared thereof.” Then the deed witnesses that he declares and directs and the trustees declare and agree that the trust premises shall be held by them on the following trusts, “that is to say, upon trust that they, the said Henry Sandford and John Burke and the survivor of them and the executors and administrators of such survivor do and shall assign, transfer, alter, vary, sell, dispose of or otherwise deal with the said trust premises and the dividends, interest, and annual proceeds thereof, and the stocks, funds, and securities into or upon which the same trust premises shall be from time to time invested in such manner in all respects as the said Henry Richards Phillips shall from time to time by any writing or writings revocable or irrevocable under his hand, attested or unattested (but not by his last will and testament or any codicil thereto unless he shall expressly refer to the said trust fund and premises), order and direct by which writing or writings the trusts of these presents may be absolutely revoked, annulled, altered, varied, or otherwise dealt with at the free will and pleasure of the said Henry Richard Phillips, and subject to the said trust to pay the income to this lady for her life, [224] and after her death in trust for her children, and if there should be no children, then in trust for the settlor.”

Having made that settlement, he executed three codicils, and then on the 4th of June, 1884, he under that power somewhat modified the trusts of the settlement; but it is not material for this purpose, because after the modification he still had the same

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power which the original settlement gave him. He made a fourth codicil dated the 7th of June, 1884, and he died on the 10th of September, 1886. The trustees of the settlement went on paying the income to the persons entitled under the trust, and the question is, whether under the provisions of the will, the will had not operated as an exercise of this power, and it was suggested pretty broadly that the trustees could no longer pay the income to the persons entitled under the settlement.

The section of the Wills Act referred to is the 27th section, and it is the latter part of that section under which this will is to be regarded. I am told, and it is argued, that this will does exercise this power, and further that whatever restriction is put upon the power by the settlement it is exerciseable by will and exerciseable in favour of any person whom the testator may choose to make an object of his bounty as appointee, and then the will by the force of the Act exercises that power. If that were an open question, it would be capable, in my mind, of very considerable argument. I will not say any more about that, because I am referred to a recent decision in which that seems to have been dealt with. But then under this clause of the Wills Act, it is contended that if there be a settlement or any other deed declaring certain powers of revocation, then a general bequest by a person who has the power operates as an exercise of that power. It seems to me to be quite the contrary. In *Pomfret v. Perring* (5 D. M. & G. 775) we find this important distinction. [His Lordship then stated the facts of that case and recapitulated the arguments and the conclusions.]

That case came before Sir JOHN ROMILLY in *Palmer v. Newell* (20 Beav. 32, 38), and he said, "I am of opinion that *Pomfret v. Perring* is an authority showing, that although a will does, by virtue of the statute, operate as a general exercise of all powers of appointment, yet that it does not operate as an exercise of a power of revoking a previous instrument." I can only say that that seems to me to be a most reasonable restriction to put upon this general provision in the Wills Act, because although no doubt you may exercise the power of revocation by simply appointing, if you refer to the power, yet you have a double operation to go through, you evoke and reappoint, and the fact of such an appointment does revoke a previous instrument and make a new appointment.

Now taking it to be the law, a law by which in that state of

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authority I hold myself to be bound and from which I see no reason to dissent, that this power in the clause of the Wills Act does not apply to a power of revoking a settlement, and that a general devise or bequest does not exercise a power of that kind, then I turn to this settlement again and ask myself, is this a general power of appointment, or is it a power of revocation? I do not choose to exercise any judgment upon it which would be other than that which the settlor himself formed, because he said that this power is a power by which the trusts of these presents may be absolutely revoked, annulled, altered, varied, or otherwise dealt with. It is a general clause, and it is to be observed that it is a power which applies not only to the revoking of the settlement, but also to the investment of the money. It means this, "Whatever is done under this settlement shall be done under my direction both as to investment and revocation" — "they shall assign, transfer, alter, vary, sell, dispose of, or otherwise deal with the trust premises and the dividends, interest, and annual proceeds thereof, and the stocks, funds, and securities into or upon which the same trust premises shall be from time to time invested in such manner in all respects as I shall from time to time by any writing or writings revocable or irrevocable direct." And therefore it is an overriding power which means this, and is just to my mind as intelligible as if it had been introduced at the end of the settlement by way of proviso, "Provided always and I hereby declare that it shall be lawful for me to direct how the trustees shall invest, or to revoke the settlement and make a new appointment," and so on, and for this purpose it seems to me clearly that this is a power of revocation and new appointment. The Court is not bound to say that a general bequest whether made before or after this can exercise a power of this kind. Referring to the authorities I have mentioned, it seems to me to be exactly the other way, and I hold that this general bequest is not an exercise of this power, because the power is not a mere power of appointment, but is a power of revocation and re-appointment.

After hearing arguments of counsel for other parties:—

[225] KEREWICH, J. :—

I do not intend to consider the question whether there [* 226] is a *contrary intention appearing by the will, because I do not think that that point really arises for decision in this case.

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The combined effect of sects. 27 and 10 of the Wills Act as applied to a case of this kind is, that where a testator having a power to appoint in any manner he may think proper makes a general bequest of his personal estate, that general bequest operates as an execution of the power, and is not to be defeated by the power requiring in terms any additional or other form of execution or solemnity other than and besides that which is required by the statute itself. That being, as I understand it, the statutory provision, I have to consider whether the power has been properly exercised in the present instance. There is no question about the terms of the will, because there is a general bequest of personal estate, and nothing more or less. The difficulty arises on the terms of the power.

Now the power is a power of appointment by writing under hand (not being a will or codicil), or by a will or codicil expressly referring to the power. It seems to me that the testator divides writings into three classes: writings which are not testamentary, writings which, being testamentary, refer to the power, and writings which, being testamentary, do not refer to the power; and he has in, I think I may say clear language, said that the power may be exercised by either one of the first two, but not by the third. Is there anything wrong, or is there anything contrary to the statute in such a provision? Mr. Barber has argued, and no doubt truly, that it is an attempt to evade the statute, but that is a liberty which is open to all Her Majesty's subjects. The question is, whether he has evaded the statute — that is, has taken the case outside the provisions of the statute. If so, there is nothing wrong in so doing. Is it a power to appoint in any manner the testator may think proper? I should have thought, as a matter of language, that it was clearly not, and that when a settlement says, "You shall not appoint by a testamentary document not referring to this power, you shall appoint only by writing not testamentary, or being testamentary referring to the power," that is an exclusion of one class of writings, and therefore the generality required by the statute does not exist. It is not in that point of view a power to appoint in any manner which he may think proper.

* To that it is answered that the words "any manner" [*227] are not to be construed with reference to the mode of exercise, but to the persons in whose favour it is to be exercised, and

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Lord ST. LEONARDS' opinion is quoted in support of that view. This opinion is found in his work on Powers (chap. vii. s. 7, pl. 47). In words he says something extremely like it, but it is not exactly that. He says: "It has been observed that the expression in the statute 'real estate, which the testator may have power to appoint in any manner he may think proper' is ambiguous" — that appears to be his Lordship's own observation — "but it refers to the extent of his power of disposition in regard to the objects, and does not require that the mode by which he may appoint should be unrestrained." Then he goes on to give a succinct report of the case of *Moss v. Harter*, 2 Sm. & Giff. 458, which seems to me by no means to bear out the conclusion at which Lord ST. LEONARDS arrived in the earlier part of the placitum. Indeed, I do not myself see exactly what immediate bearing that case has upon the point of construction which is there noticed. But the statement of *Moss v. Harter* contradicts, as it seems to me, what is to be found in the few lines preceding, because Lord ST. LEONARDS says, that "although a power is confined to a will, and cannot be exercised by act *inter vivos*, and consequently the property cannot be appointed, strictly speaking, in any manner the donee may think proper, yet the power falls within the provisions of the Act, for the will is an instrument within the provisions of the statute, by which instrument the donee may appoint in any manner he may think proper." I conclude from that that Lord ST. LEONARDS must have thought, as certainly I think, that a power to appoint by deed or other writing not being a will is not a power to appoint in any manner so as to be exerciseable by a will under the 27th section of the Wills Act. But for what is said in the preceding part of the sub-section I should have thought it was clear upon the face of it. I do not feel hampered by what Lord ST. LEONARDS has there said, or by *Moss v. Harter*, a decision which has been referred to by the Court of Appeal in *In re Clark's Estate*, 14 Ch. D. 422, and by Mr. Justice NORTH in the [*228] case which * has been cited, but not with reference to this particular point.

Holding, therefore, that "in any manner" does oblige the Court to distinguish between writings or deeds and testamentary documents, I consider that the testator here had not a power to appoint in any manner he might think proper, because one class of documents, namely, testamentary writings in which the power is not

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expressly referred to, were excluded from the exercise of the power.

Then is a reference to the power an additional or other form of execution or solemnity within sect. 10? In my judgment it is something quite different. It is not a form of execution or solemnity; it is something which must be in the body of the will — it must be part of the will — and I cannot see why a testator should not be bound to refer to the power without in any way contravening the general, and no doubt beneficial, intention of the 27th section.

That being my clear opinion on this matter if unfettered, I am met by the decision of Mr. Justice NORTH, in *In re Marsh, Mason v. Thorne*, 38 Ch. D. 630, and that, no doubt, has raised considerable difficulty. Mr. Justice NORTH certainly decided this point differently. It may be that the point was not fully discussed and argued. According to the report that seems to be the case, but I can hardly think that the point was not present to the learned Judge's mind, and certainly in a few words on page 633, and still more clearly in page 634, he does, to my mind, decide this question. He says: "The real question is whether those words in the settlement, 'expressly referring to this power or to the subject thereof,' can limit or modify the power which the law has given to the testator. I do not see how a statutory power can be limited in that way." He decided the case mainly upon the question of contrary intention, but he did express that opinion. This case was decided just twelve months ago. It has been in the Law Reports, and circulated among the profession for some months, and under ordinary circumstances I should deem it my duty to simply follow the decision of a Judge of co-ordinate jurisdiction, either expressing or not expressing my own opinion according to what I thought

* best under the peculiar circumstances of the case. But [*229] here the circumstances are not ordinary. The question has been raised in another case before Mr. Justice KAY, and in a third case before Mr. Justice CHITTY. Mr. Justice KAY, in *Charles v. Burke* (12th December, 1888), 60 L. T. 380 (p. 566, *ante*), avoided, as I venture to think a Judge is bound to avoid if he can, a difference from another Court of equal jurisdiction with his own, by deciding the point before him on different grounds which were satisfactory to his mind, and he expressly does so in his judgment, of which I have seen a note. He certainly did doubt very much

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the soundness of Mr. Justice NORTH's decision. I cannot say more, and I cannot regard Mr. Justice KAY as having definitely differed from Mr. Justice NORTH.

Then in the case before Mr. Justice CHITTY, *Robinson v. Burke*, 41 Ch. D. 417, 421, it is quite true that he takes pains to say that there is a distinction between the case before him and the case before Mr. Justice NORTH. It may be so, but it seems to me that the words of the power in the two cases were so exactly alike that the distinction is one of considerable difficulty. On the other hand, it is possible that the case was presented in such a way to the learned Judge's mind that he saw a distinction which does not occur to me. But there is no doubt whatever of his opinion, because while pointing out that it was distinguishable, he says this: "If it is not distinguishable, I should have felt myself in a little difficulty in holding that I was bound by that decision." That being so, I am not only at liberty to express my own opinion — a liberty which I might or might not exercise — but I think that I am bound to express it, and that it would be clearly wrong of me, notwithstanding that the case has been decided by one Judge, when I know that other Judges do not agree, to withhold from the suitors in a particular case, and from those interested in such matters, my opinion on the point. Therefore I have no hesitation in acting upon what my own opinion is, and that opinion differs — I say so in plain words — from that which I understand to have been expressed by Mr. Justice NORTH in the case before him.

I must decide in the plaintiff's favour.

[*230] *G. Allen, as representing the testator's estate, appealed from this decision. The appeal was heard on the 20th of December, 1889; and the following judgments were pronounced:—

[231] COTTON, L. J.:—

This is an appeal on a point on which learned Judges have expressed contrary opinions, but in my judgment the decision appealed from was right. The question is, whether the will made by the testator in this case is a good execution of a power contained in a settlement executed by him on the 4th of June, 1884. I quite agree that according to sect. 27 of the Wills Act you cannot look for contrary intention except to the will itself. But there is

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something more in the case than that — the question is whether there is a power which enables this will to operate;

* whether the settlement gives the donee “power to ap- [* 232] point in any manner he may think proper.” A difficulty arises on these words, because they do not in terms refer to a power exercisable by will. It is, however, conceded that if there were only a power to appoint by deed a will would not do, even although there is no limitation of the objects in favour of whom the power could be exercised, and it is also conceded that the section applies to a general power of appointment by will, though there is no power to appoint by deed. That I think is reasonable enough. This is an Act dealing with wills, and the object of sect. 27 is not to enable persons to appoint by will, but to make a general disposition in a will operate as an exercise of a power to appoint by will in any manner the testator thinks fit, though the testator does not expressly show that he has an intention to execute that power. That does not go far enough to support the appellant’s case. Although a general power to appoint by will is sufficient, we must first see whether on the will there is a contrary intention, *i. e.*, an intention not to exercise the power. That is out of the question here. But then we must see whether the will is such as to come within the power, and, in my opinion, if there are any conditions or limitations imposed by the settlement creating the power, to which the Act does not prevent effect being given, we cannot disregard them. Now the Act in express terms prevents regard being had to any conditions attempted to be imposed as regards the mode of execution, but it does not refer to any other conditions. In the present case the settlor says in effect: “My settlement may be put an end to, and the property may be otherwise disposed of, by a will expressly referring to this power.” Any other will — a will not expressly referring to the power — is not within that description, and as there is nothing in the Act to prevent such a condition being imposed I cannot see how under sect. 27 this will can be said to be a good execution of the power. In my opinion this decision is right.

BOWEN, L. J. : —

I am of the same opinion. The scope of sects. 10 and 27 is totally distinct. Sect. 10 provides that no appointment by will shall be valid unless the same be executed in the manner pointed

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[* 233] * out in a previous portion of the statute, and that every will so executed shall, as regards execution and attestation, be a valid execution of a power, although other formalities prescribed by the donor of the power may not be observed. Sect. 27 has nothing to do with forms of execution or other solemnities: it provides that general gifts under a will are to include property over which the testator has a general power of appointment, unless the will shows a contrary intention. In the present case we have to construe the words which occur in the second branch of sect. 27, which provides that "a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper." I think that the words "he may have power to appoint in any manner he may think proper" are equivalent to "he may have power to appoint by the will in question in any manner he may think proper." It appears to me that this is to be collected from the context; for the statute is dealing only with wills, and the section contains nothing to make any will operate as an exercise of a power which could not otherwise have been exercised by it; therefore you are not doing any violence to this section by reading those words in the sense I have mentioned. Now if that is the true construction of those words, it is obvious that in the present case the will does not answer to the description given in the power, and that is a fatal reason why the section does not apply. The statute is not intended to cure dissimilarities between wills and powers except so far as sect. 10 applies, which section has no bearing on this case. Here there is a dissimilarity between a will and a power which goes directly to the form of the will itself. It has been argued indeed that it is not right to allow a settlor by expressions in the instrument creating the power to escape from the intention of the statute. But the section which we have to interpret is not a prohibitory section. It is an enabling section, and I cannot see any reason why a man should not so frame his settlement as to exclude from the operation of that section any particular kinds of will. Why may not a man impose upon *the will the condition that it shall expressly refer to the power? Suppose that a man were to go a little further than the settlor does

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in this case, and to say that the property is only to be appointed by a will in which the testator shall *nominatim* refer to the settlement, and refer to the parties who are parties to the settlement. If he chooses to make a strange condition like that, he surely may do so, and the donee of the power cannot escape from the obligation of that condition, and make an effectual appointment by a will omitting any reference to the matters which the settlor insisted upon as necessary to be mentioned in a will exercising the power. It seems to me that when this matter is argued out it is really quite clear, and I agree with the LORD JUSTICE that the order under appeal is right.

FRY, L. J. : —

I am of the same opinion. The words we have to interpret are that a general bequest of the personal estate of the testator shall be construed to include any personal estate "which he may have power to appoint in any manner he may think proper." Now does that mean "any power to appoint in any manner he may think proper"? It does not, because if it did it would enable a person to appoint by will property which he had only power to appoint by deed. Does it mean "by any will"? I am of opinion that it does not, and for this reason, that if it did it might frustrate the intentions of the person who created the power. For instance, supposing a father on the 1st of June gave a power to his son to appoint by will to any person whom he might think fit, and in any manner he might think fit, provided that the will was executed after the 1st of January next, and on the 2nd of June the son made his will, and on the 3rd of June died. According to the argument of the appellant, that will would have been a good exercise of the power, and the fetter which the father had a right to impose upon the power he was creating would be frustrated. Of course, if the Legislature had said that no such fetter should be imposed by the person who created a power, the Court must have yielded to it, but the Legislature has not said so, and it is not for us to invent fetters in the disposition of property.

* I entirely agree with Lord Justice BOWEN, that this [*235] clause is not intended to deal with any relation between the power and the instrument by which it is to be exercised; it is intended to deal only with the exercise of the power by the will. Again, the fact that the 10th section expressly removes any fetters

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which the settlor may attempt to put on the mode of executing a will by which the power is to be exercised, seems to me to go far to show that where that section does not apply, there was no intention to affect any fetter imposed by the creator of the power. I think therefore that the true meaning of the words "may have power to appoint in any manner he may think proper" is "may have power to appoint by the will in question in any manner he may think proper." The appeal therefore fails.

ENGLISH NOTES.

The same principle was followed by NORTH, J., in *In re Davies, Davies v. Davies*, 1892. 3 Ch. 63, 61 L. J. Ch. 595, 67 L. T. 548, 41 W. R. 13, where the rules of a life assurance society provided that the assured might nominate a person to receive the sum assured, and that in case of no nomination the sum should be paid to his assigns under any disposition or charge specifically affecting the same, either by express reference thereto or by reference generally to sums due on assurances by deed, will, or other instrument. If no nomination, the sum was to be paid to his widow; if no widow, to his children. The assured left no widow; but made a will by which, without specific reference to the fund, he gave his estate in trust for his three daughters and the widow and children of a deceased son. It was held that the three daughters were entitled to the fund independently of the will, and that the fund was not assets for payment of creditors, though it might have been so if the power had been actually exercised.

In the case of *In re Byron's Settlement, Williams v. Mitchell*, 1891, 3 Ch. 474, 60 L. J. Ch. 807, 65 L. T. 218, 40 W. R. 11, it was held by Mr. Justice KEEKEWICH that a power to appoint to any person, with certain exceptions, is not a general power within sect. 27 of the Wills Act. It had been held in Ireland that a power to appoint to any one except A. is a general power so as to make the appointed fund assets for payment of debts. *Edie v. Babington*, 3 Ir. Ch. Rep. 568; but as the learned Judge pointed out, that is another branch of the subject of general powers. See No. 22, *post*.

AMERICAN NOTES.

In several states there are statutes similar to the 27th section of the Wills Act, providing that a general gift in a will shall operate as an exercise of a general power of appointment, unless a contrary intention appears in the will. See 1 Stimson's American Statute Law, sect. 1659.

In other states the usual rule is that the will must show that the donee intended to execute the power. In his much-quoted opinion in *Blagge v. Miles*, 1 Story (U. S. Circ. Ct.), 426, Judge STORY states as the result of the

No. 22. --- *Holmes v. Coghill*, 7 Vesey, 499. — Rule.

authorities, that there are three classes of cases in which there is a sufficient demonstration of an intended execution of a power: 1st, where there is some reference in the will or other instrument to the power; 2nd, where there is a reference to the property which is the subject on which it is to be executed; 3rd, where the provision in the will or other instrument executed by the donee of the power would otherwise be ineffectual, or a mere nullity; in other words, would have no operation except as an execution of the power. See cases collected in 18 Am. & Eng. Encycl. of Law (1st ed.), 929-937.

But in some states it has been held, without any statute on the subject, that a general devise is to be taken as an execution of a general power, unless a contrary intention appears in the will. *Amory v. Meredith*, 7 Allen (Mass.), 397; *Willard v. Ware*, 10 id. 263; *Bangs v. Smith*, 98 Massachusetts, 270; *Sewall v. Wilmer*, 132 id. 131; *Cumston v. Bartlett*, 149 id. 213; *Hassam v. Hazen*, 156 id. 93; *Emery v. Haven*, 67 New Hampshire, 503; *Johnston v. Knight*, 117 North Carolina, 122.

No. 22. — *HOLMES v. COGHILL*

(1802.)

RULE.

A POWER, although general, does not, unless executed, make assets for payment of debts of a deceased donee of the power; nor will equity supply the want of execution.

Holmes v. Coghill.

7 Vesey, 499-508; 12 Vesey, 206 (6 R. R. 166; 8 R. R. 323).

General Power. — Execution. — Assets for Payment of Debts.

Distinction between a power and absolute property. A power, unless [499] executed, not assets for debts.

Power executed by will, but afterwards discharged: and a new power created. A subsequent codicil will not by the mere effect of republishing the will be an execution of the power.

Though the rule is settled, perhaps with some violation of principle, but with no practical inconvenience, that equity will, in certain cases, aid a defective execution of a power, the want of execution cannot be supplied.

By the settlement, previous to the marriage of Sir John Coghill Bart., dated the 15th and 16th of October, 1754, estates in Ireland, in fee simple, in the counties of Kilkenny and Cavan, and leaseholds for lives in the county of Kildare, were settled to the use of

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Sir John Coghill for life ; with remainder, subject to an annuity by way of jointure and a term for raising portions for younger children, to the first and other sons of the marriage in tail male ; and it was declared, that Sir John Coghill should have full power by any deed or writing to be by him subscribed, sealed, and executed, in the presence of three or more credible witnesses, or by his last will and testament, by him signed, published, and declared, in the presence of the like number of witnesses, to charge the said premises in the counties of Kilkenny, Cavan, and Kildare, with any sum, not exceeding £2000 for such uses and purposes as he should think proper, but without prejudice to the aforesaid jointure and portions.

Sir John Coghill was also entitled under a will to estates in the counties of Meath and Dublin ; with remainder in tail to his eldest son, who attained the age of twenty-one in 1787. Soon afterwards they joined in suffering recoveries of all the estates, except the leaseholds ; and by indentures of settlement, dated the 29th and 30th of June, 1787, they conveyed to trustees and their heirs the estates in the counties of Kilkenny, Meath, and Dublin, and the leaseholds in the county of Kildare, subject to the jointure and provision for younger children, but freed and forever discharged of and from all right and power by the said settlement reserved to Sir John Coghill by deed or will to charge and [* 500] *encumber the premises in the counties of Kilkenny and Kildare with any sum, not exceeding £2000, for such uses and purposes as he should think proper.

This conveyance was declared to be in trust for securing an annuity to the son, and then to trustees for a term of two hundred years ; and subject thereto, to the joint appointment of the father and son ; and, in the mean time and until default of appointment, to Sir John Coghill for life ; and then to the survivor of him and his son. The trust of the term of two hundred years was declared to be for securing the annuity to the son : and then, that the trustees should at the request and desire of Sir John Coghill, to be signified, and to be by him signed, by demise, sale, and mortgage, of the premises in the counties of Meath and Dublin, comprised in the term, or of a competent part thereof, or by such other ways and means as they or the survivor, &c., shall think fit, raise and levy such sum or sums of money as Sir John Coghill should direct and appoint, not exceeding in the whole £2000 ; and pay the same

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to Sir John Coghill or his assigns in his lifetime to or for his and their own use forever; or if the same or any part thereof shall not be levied, raised, and paid over, to him and assigns in his lifetime, then upon trust by all or any of the ways and means aforesaid to raise and levy the same at such time and times, and to pay over the same to such person or persons, as Sir John Coghill should by deed or by his last will by him duly executed and attested by two or more credible witnesses, direct and appoint; and then upon further trust to indemnify the aforesaid lands in the county of Cavan from all charges affecting the same; and then upon further trust to raise a farther sum in addition to the portions under the settlement.

Sir John Coghill by his will, dated the 9th of September, [501] 1775, and several codicils, executed and attested so as to pass real estate, gave the sum of £2000, to be raised under his power, and all the rest and residue of his personal estate, goods, and effects (except his furniture at Coghill Hall, which he directed to be appraised, and delivered at the appraised value to his son), and the amount of such appraisement, with the above fund to be applied towards payment of his debts; and he appointed his wife and two other persons executrix and executors. He died in March, 1790. One of the codicils was subsequent to the deed of 1787; but it took no notice of the power; and was for a distinct purpose, wholly unconnected with it.

The bill was filed by simple-contract creditors against the widow, who alone proved the will, and against Sir John Thomas Coghill, the eldest son and heir-at-law of the testator; praying an account and payment of their debts, an account of the personal estate; and that if any part of the personal estate has been applied in payment of specialty debts, for so much the simple-contract creditors may stand in the place of the specialty creditors upon the real estates, of which the testator was seised, or in which he had such an interest as may be affected with specialty debts, and receive satisfaction thereout.

The defendants stated by their answers the accounts, from which it appeared that the personal estate and the real estate descended were insufficient for the specialty debts. The general question therefore was, whether the plaintiffs could avail themselves of the fund, which was the subject of the power, considered either as the absolute property of Sir John Coghill; or the power

[* 502] * being executed by the codicil, as republishing the will; or the want of execution to be supplied in equity.

Mr. Romilly and Mr. Hall, for the plaintiffs : —

This power must be considered as executed by the effect of the codicil, republishing the will. Where a codicil takes notice of the will, it is clearly a republication. *Carte v. Carte*, Amb. 28, 3 Atk. 174; *Heglin v. Heglin*, Cowp. 130; *Pigott v. Waller*, 7 Ves. 98. The effect of this codicil is to make the whole speak at that date; and therefore it is a republication. But if this case cannot be so considered, without any disposition the fund, which is the subject of the power, will go as the absolute property of the party. Under similar circumstances the money has been raised for creditors: though there was no execution of the power, and in other instances against the express appointment. *Lassells v. Lord Cornwallis*, 2 Vern. 465, Pre. Ch. 232. In *Maskelyne v. Maskelyne*, Amb. 750, there was no execution of the power. In *Robinson v. Dugdale*, 2 Vern. 181, it was raised for an administrator, a general power to appoint giving the absolute property, and an execution not being necessary. In *Goodtitle v. Otway*, 2 Wils. 6, it was held, that a power to dispose of, generally, gave the absolute property, and not in nature of a power. In *Tonkinson v. Dighton*, 1 P. Wms. 149 (Salk. 239; 10 Mod. 31; Com. 194; 2 Eq. Ca. Ab. 309, pl. 13), the distinction is taken by Lord Chief Justice PARKER between a general power, giving the absolute property, and a limited power, confined to particular objects. In *Maddison v. Andrew*, 1 Ves. 57,

the subject of a power was considered the absolute property. In *Pack v. Bathurst*, 3 Atk. 269, and *Troughton* * v.

Troughton, 3 Atk. 656, 1 Ves. 86, there had been an appointment: but Lord HARDWICKE'S opinion was, that though there had been no appointment, and nothing done, it would be assets for debts. In *Bainton v. Ward*, 2 Atk. 172,¹ Lord HARD-

¹ That case appears to be stated more correctly 2 Ves. 2. The following abstract is taken from the Register's Book : —

Power to George Ward by deed or will to charge the premises with any sum not exceeding £2000.

George Ward, having made his will, dated the 25th of April, 1726, and thereby taking notice of the said deed and power, devised to his mother, the said Phoebe Ward, £500, to the said defendants Lætitia and Anne, £1000; and the remaining

£500 to his wife Isabella; and made her sole executrix; and charged the premises with the said £2000 legacies; and died without issue, indebted to the plaintiffs and others.

The decree declared, that the sum of £2000, with the interest thereof, which the said George Ward had power to appoint by virtue of the said deed of the 12th of February, 1725, and of which he made an appointment by his will, is to be considered as part of his personal estate,

No. 22. — *Holmes v. Coghill*, 7 Vesey, 503-505.

WICKE, according to the report in Atkyns, states, that "Where there is a general power given or reserved to a person for such uses, intents, and purposes, as he shall appoint, this makes it his absolute estate; and gives him such a dominion over it as will subject it to his debts."

Mr. Alexander and Mr. Fonblanque, for the defendants: [504]

This is not the absolute property of the party, but a power to be executed in a particular manner. According to the statement in the great case of *Lord Townshend v. Windham*, 2 Ves. 1, there was an appointment of the whole in *Bainton v. Ward*; and Lord HARDWICKE'S opinion is expressed in *Lord Townshend v. Windham*, that it will not do without executing the power. In *Tollet v. Tollet*, 2 P. Wms. 489, the distinction is taken between a defective execution and a non-execution of a power: this Court in the particular cases aiding the former, but not the latter. All the cases cited fall within the distinction, there having been an execution in all of them. The rule may be harsh in not going this length in favour of creditors; but it must prevail. In this case there is total absence of intention to execute. In many instances the date of the will is brought down to that of the codicil: *Pigott v. Waller*, 7 Ves. 98; but this codicil is quite distinct, and does not look to the power. This is not like *Tomlinson v. Dighton*, in which the question was, whether the effect was not to enlarge the estate.

Mr. Romilly, in reply. — It is very difficult to find a reason for the distinction between the defective execution and the non-execution of a power, as is observed in *Lassells v. Lord Cornwallis*. The case that approaches nearest to this is *Lord Townshend v. Windham*; but it turned entirely upon the particular circumstances. As to the point of republication, the objection is, that the thing, to which the will applied, did not exist at the date of the codicil: but the effect of this codicil, annexed to the will, duly executed, is to make the * whole speak at that date. It is [* 505] therefore a republication of the will, and an execution of the power.

liable to the satisfaction of the residue of his said debts. Reg. Lib. A. 1740, folio 613. See 12 Ves. 215.

A case frequently referred to upon this subject under the title of *Shirley v. Lord Ferrers*, before Lord TALBOT, is probably *Lord Ferrers v. Lady Ferrers*, Reg. Lib.

A. 1733, folio 285; the date of which, 7th December, 1733, corresponds with the case in the beginning of Forester. That decree however does not appear to include a decision of this point.

Aug. 5th. The MASTER OF THE ROLLS : —

The question in this cause is, whether the sum of £2000, which Sir John Coghill had power to raise, should be considered assets for his debts. The creditors contend, first, that he has executed the power. If he has, there is an end of the question. If he has not, secondly, they insist, that this sum is substantially his property ; as he had an absolute power to appoint it.

As to the first point, it is clear, the only power in existence at his death was created by the deed of 1787. The power reserved by the marriage settlement was discharged for valuable consideration. That power he had executed by his will. But the power itself being gone before his death, the will had nothing to operate upon : unless it can be applied to the new power, created for appointing the same sum, to be raised out of different estates. It is admitted, he has not directly executed the new power. But it is said, that subsequent to the creation of it he executed a codicil, that has the effect of republishing the will, and making it speak as at the time of the republication. Be it so. It speaks only of the power given by the marriage settlement, which was as much gone, as if it never had existed. There is no way in which the will can be made to speak of the new power, for a new consideration, affecting different estates. I am clearly of opinion, there is no execution of this power.

Upon the second point, there is an evident difference between a power and an absolute right of property : not so much with [506] regard to the party possessing the power, as to the party to be affected by the execution of it. If our attention is to be confined to the former entirely, there is no reason why the money he has a right to raise should not be considered his property, as much as a debt he has a right to recover. But the latter can only be charged in the manner, and to the extent, specified at the creation of the power. The compact is not to raise £2000, absolutely, and in all events ; but, that it may be raised in a certain manner : viz. according to his appointment by deed or will, to be duly executed, and attested by two or more witnesses. To say that without a deed or will this sum shall be raised, is to subject the owner of the estate to a charge in a case in which he never consented to bear it. The chance that it may never be executed, or, that it may not be executed in the manner prescribed, is an advantage he secures to himself by the agreement, and which no one has a

No. 22. — *Holmes v. Coghill*, 7 *Vesey*, 506. 507.

right to take from him. In this respect there is no difference between a non-execution and a defective execution of a power. By the compact, the estate ought not to be charged in either case. It is difficult therefore to discover a sound principle for the authority this Court assumes for aiding a defective execution in certain cases. If the intention of the party possessing the power is to be regarded, and not the interest of the party to be affected by the execution, that intention ought to be executed, wherever it is manifested; for the owner of the estate has nothing to do with the purpose. To him it is indifferent, whether it is to be exercised for a creditor or a volunteer. But if the interest of the party to be affected by the execution is to be regarded, why in any case exercise the power, except in the form and manner prescribed. He is an absolute stranger to the equity between the possessor of the power and the party in whose favour it is intended to be executed. As against the debtor, it is right that he should *pay. But [* 507] what equity is there for the creditor to have the money raised out of the estate of a third person in a case in which it was never agreed that it should be raised? The owner is not heard to say, it will be a grievous burden, and of no merit or utility. He is told, the case provided for exists: it is formally right; he has nothing to do with the purpose. But upon a defect which this Court is called upon to supply, he is not permitted to retort this argument; and to say, it is not formally right: the case provided for does not exist; and he has nothing to do with the purpose. In the sort of equity upon this subject there is some want of equality. But the rule is perfectly settled; and, though perhaps with some violation of principle, with no practical inconvenience. But farther than supplying a defect in the execution the Court has never gone. In *Lassells v. Lord Cornwallis*, the LORD KEEPER says (2 Vern. 465), that "The Court has not gone so far as, where a man has a power to raise money, if he neglect to execute that power, to do it for him; although he thought, it might be reasonable enough, and agreeable to equity in favour of creditors."

At the opening I was strongly impressed with an idea, that there was no authority for the proposition contended for by the creditors. None was adduced, except some generality of expression in Atkyns's statement of the judgment in *Bainton v. Ward*. There is no such general proposition necessary to the decision of that case; for the whole sum was appointed: in which particular

 No. 22. — *Holmes v. Coghill*, 7 Vesey, 507, 508. — Notes.

the statement is more correct, as introduced (2 Ves. 2), in the Report of *Lord Townshend v. Windham*; and there Lord HARDWICKE lays it down expressly, that without an appointment no person could be entitled to the money; though the power [*508] was as large as in this instance. It was *argued, that because the Court will for creditors lay hold of the money, when it is appointed for a volunteer, the Court ought to lay hold of it for them, though there is no appointment; for in the former case the application is against his intention. But in the given case the money is already raised by a due execution of the power; and the Court only directs the application. It does not follow, that by its own act it shall charge the estate, when the power is not executed, nor attempted to be executed. Many of the cases cited determine only, that a limited gift to a man, with a power to dispose of the thing given, will carry the ownership. But there is no doubt, this is a power in the proper sense of the word; and the power not having been executed, I am of opinion, the money cannot be raised.

This decision was affirmed upon appeal, by Lord ERSKINE, CHANCELLOR (reported in 12 Ves. 206, 8 R. R. 323).

ENGLISH NOTES.

This rule was applied in *Ashley v. Costin* (1888), 21 Q. B. D. 401, 57 L. J. Q. B. 491, 59 L. T. 224, 37 W. R. 140, the case of an assurance contract, where, by the rules of the society, the committee were empowered to pay the sum assured "to such person or persons as in their discretion they might think fit, it being always understood that the extent to which the committee shall be bound to the payment of death allowances shall be, in the case of a married man, to his widow or children, or to his parents, or any of them, in such proportions as the committee shall determine; and in the case of a single man to his parents, brothers, or sisters, or any of them, in such proportions as aforesaid, unless the deceased member, married or single, have otherwise bequeathed the money, in which case it shall be paid to the person to whom it has been so bequeathed."²² The deceased was a single man, and had not bequeathed the allowance in question; and the society in their discretion paid the allowance to his sister. It was held by CAVE, J., that she was entitled to retain the sum against the administrator, who claimed the sum for payment of the debts of the deceased.

No. 22. — Holmes v. Coghill. — Notes.

The principle is not altered by the 10th section of the Judicature Act, 1875, which introduces into the administration of the insolvent estate of a deceased person, some of the rules of bankruptcy; for that enactment does not apply so as to bring into the estate what would not otherwise be assets. *In re Withernsea Brick Works* (1880), 16 Ch. D. 337, 50 L. J. Ch. 185, 43 L. T. 713, 29 W. R. 178; *In re D'Epineuil, Tudman v. D'Epineuil* (1882), 20 Ch. D. 217, 51 L. J. Ch. 491, 46 L. T. 409, 30 W. R. 423.

AMERICAN NOTES.

To the effect that, where a person has a general power of appointment, and actually exercises the power, whether by deed or will, in favor of volunteers, a Court of equity will treat the property appointed as assets of the appointor, subject to the claims of his creditors in preference to the claims of his appointees. See *Knowles v. Dodge*, 1 Mackey (D. C.), 66; *Clapp v. Ingraham*, 126 Massachusetts, 200; *Johnson v. Cushing*, 15 New Hampshire, 298; *Tallmadge v. Sill*, 21 Barbour (N. Y.), 31; *Freeman v. Butters*, 94 Virginia, 106; 4 Kent's Commentaries, *339; 18 Am. & Eng. Encycl. of Law, 1st ed. 986.

In *Smith v. Garey*, 2 Devereux & Battle Eq. (N. Car.) 12, 49, the Court said that under such circumstances the appointee is a trustee for the creditors of the appointor.

In *Patterson v. Lawrence*, 83 Georgia, 703, it was held that in deciding whether the property appointed is assets for the payment of debts, it must be determined whether or not the appointor left other property sufficient to meet the claims of his creditors.

The rule by which appointed property is treated as assets was sharply criticised by Chief Justice GIBSON in *Commonwealth v. Duffield*, 12 Pennsylvania State, 277, as follows: "There is such flagrant injustice in applying the bounty of a testator to the benefit of those for whom it was not intended, that the mind revolts from it. An appointee derives title immediately from the donor of the power by the instrument in which it was created; and consequently not under but paramount to the appointor, by whom it was executed; by reason of which it is impossible to conceive that the appointor's creditors have an equity. A man who is employed to manage the conduit-pipe of another's munificence is authorized by a general power of disposal to turn the stream of it to any person or point within the compass of his discretion; and his creditors have no right in justice or reason to control him performing his function because it was not assigned to him as their trustee. It is the bounty of the testator, and not the property of his steward, that is to be dispensed." See *King's Estate*, 14 Weekly Notes of Cases (Penn.), 77.

And Judge STORY says: "Why, when the party executes a power in favor of others, and not of himself, a Court of equity should defeat his intention, although within the scope of the power, and should execute something beside that intention and contrary to it, is not very intelligible. If it be said that he ought to be just before he is generous, that addresses itself merely to his sense of morals. The power enabled him to give, either to himself, or to his credi-

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tors, or to mere voluntary donees. Why should a Court of equity restrict this right of election if *bona fide* exercised? Is not this to create rights, not given by law, rather than to enforce rights secured by law? If the power was *bona fide* created, why should a Court of equity interpose to change its objects or its operations?" 1 Story, Equity Jurisprudence, sect. 176, n. 3.

In *Wales v. Bowdish*, 61 Vermont, 23, it was held that, where an estate is devised to an executor in trust for a devisee named, to the use of such devisee for life, with a power of appointment after his death, and the power is exercised, the estate cannot be charged with those debts of the devisee which existed when the power was created.

The New York Revised Statutes (Pt. II. ch. 1, t. 2, § 93) provide as follows: "Every special and beneficial power is liable, in equity, to the claims of creditors, in the same manner as other interests that cannot be reached by an execution at law, and the execution of the power may be decreed for the benefit of the creditors entitled." See also the sections of the New York statutes quoted in the American Notes to No. 20 of Power, *ante*, p. 564. It has been held that these statutes abrogate the common law of powers, and that, therefore, in cases not covered by them, creditors cannot reach appointed property. *Cutting v. Cutting*, 86 New York, 522.

**NO. 23. — IN RE COTTON'S TRUSTEES AND
THE SCHOOL BOARD FOR LONDON.
(1882.)**

RULE.

A POWER is extinguished when all the purposes for which it was originally created have ceased to exist. What those purposes are, is a question of intention depending on the construction of the instrument creating the power.

**In re Cotton's Trustees and
The School Board for London.**

19 Ch. D. 624-629 (s. c. 51 L. J. Ch. 514; 46 L. T. 813; 30 W. R. 610).

[624] *Settlement. — Power of Sale. — Duration. — Determination. — Intention of Settlor. — Remoteness.*

A power given to the trustees of a settlement or will to sell land comprised in it can be exercised by them after the property has, under the trusts, become absolutely vested in persons who are *sui juris*; if on the construction of the instrument it appears to be the intention of the settlor or testator that it should

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be then exercised, provided that the power in its creation was not obnoxious to the Rule against Perpetuities, and that the *cestuis que trustent* have not put an end to the trusts by electing to take the property as it stands.

Adjourned Summons. On the 3rd of May, 1881, the trustees of the will of William Cotton entered into an agreement with the School Board for London to sell to the board a piece of land, with some houses thereon, situate in Acland Street, in the parish of Limehouse, Middlesex.

By the abstract of title delivered by the vendors, it appeared that they purported to sell the property under a power of sale contained in the will of William Cotton.

The testator, by his will dated the 6th of July, 1865, gave and devised his Bow Common estate, which included the property sold to the board, unto and to the use of the trustees therein named, their heirs, executors, administrators, and assigns respectively, upon and for the several trusts and purposes following, viz., upon trust that the trustees should raise by way of mortgage upon the estate, or some part thereof, the sum of £30,000, and should stand possessed of the same and the interest thereof upon the trusts thereafter declared, and (subject as aforesaid) that the trustees should, for so long as they should think fit, during a period commencing at his decease and ending at the expiration of a term of twenty-one years, to be computed from the decease of the last survivor of the several persons named in his will, manage the estate, in whatever manner they should deem expedient, they * exercising, as regarded such management, all [* 625] and every or any of the powers and discretions thereafter given to them, in conformity, nevertheless, with the express restrictions and qualifications thereafter contained. And the testator declared that, subject thereto, his trustees should stand seised and possessed of the estate in trust for his wife during her life, with remainder upon trust for the benefit of his eight children in equal shares. The testator then, after stating that his Bow Common estate consisted in part of building sites and land adapted for building, and in other part of incomplete buildings and works, and that it was his wish that such sites and land should be built upon, laid out for building, or otherwise improved, and that such incomplete buildings and works should be completed as expeditiously as circumstances would reasonably admit of, proceeded to

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give to his trustees various specific powers of management, the nature of which is stated in the judgment of the Court. And he further provided that it should be lawful for his trustees, at any time or times during the said period commencing on the day of his decease and ending on the day of the expiration of a term of twenty-one years from the decease of the last survivor of the several persons named in his will, absolutely to sell his Bow Common estate, or any part or parts thereof, either wholly or partially freed from all or any of the mortgages affecting the same.

The testator died on the 1st of December, 1866, and his widow had died before the agreement to sell to the board. The board objected that, if all the persons beneficially entitled under the will were *sui juris*, the power of sale was gone. The vendors replied that the persons entitled were all *sui juris*, but they insisted that the power of sale was still subsisting. The board required that the persons beneficially entitled under the will should join in the conveyance. The vendors declined to comply with this requisition, and took out a summons under the Vendor and Purchaser Act, 1874, asking the opinion of the Court whether they had, under the will of the testator, power to sell and to make a valid assurance of the property comprised in the agreement with the board, without the concurrence of any other person or persons, so as to vest the property in the board as the purchasers thereof in fee simple.

[* 626] * W. W. Karslake, Q. C., and C. J. Ruscombe Poole, for the summons:—

The power of sale is still in existence, and we can make a good title under it.

A. R. Kirby, for the board:—

The power of sale is one of a set of powers of management, and is only ancillary to the settlement. The settlement has come to an end by the vesting of the property, under the ultimate limitations, absolutely in persons who are *sui juris*, and the power is therefore at an end. Sugden on Powers, 8th ed. pp. 850 *et seq.*; *Lautsberg v. Collier*, 2 K. & J. 709; *Wolley v. Jenkins*, 23 Beav. 53; *Tait v. Swinstead*, 26 Beav. 525. The cases of *In re Brown's Settlement*, L. R. 10 Eq. 349, and *Peters v. Lewes and East Grinstead Railway Company*, 18 Ch. D. 429, were exceptions from the general rule, but the rule is fully recognised.

At any rate, the power may be at any moment determined by

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the beneficiaries, and such a title ought not to be forced on a purchaser.

FRY, J. : —

The question is whether the trustees of the will of the late William Cotton have power to sell certain property to the School Board for London, without the concurrence of any other person or persons.

It appears that the beneficial interest in the property in question is vested in undivided eighths in certain persons, and it has been argued on the part of the purchasers that, whenever the interests under a will or settlement have absolutely vested in a person or persons who are *sui juris*, any existing powers with regard to that property have come to an end.

Before proceeding to consider that argument, I must observe that there is the greatest possible distinction between the determination of a power under the instrument which created it, and its extinction by the concurrence of the persons who are entitled to take the property which is the subject of the power.

The *former appears to me, subject to the question of the [* 627] power going beyond the period allowed by law for the duration of such powers, to be a mere question of the intention of the donor of the power, as evidenced by the instrument by which the power was created. It seems needless to dwell upon that, because, if the power be valid, the sole question is whether it has been created, and that again is really a question of intention and of construction. Lord St. Leonards in his book upon "Powers" has pointed out that that is the true criterion as to the existence of powers. Referring to the cases arising out of settlements, he says (8th ed. p. 859): "It frequently happens that a tenant for life of an estate in strict settlement, with the ultimate remainder to himself in fee, with powers of leasing, jointuring, charging portions, sale and exchange, &c., acquires the fee by the failure of the limitations intermediate between his life estate and remainder; and it may be questioned whether all these powers continue after the accession of the fee. Perhaps the better opinion is, that the powers cannot be exercised after the union of the estates, on the ground, not that the powers are merged, but that, according to the true construction of the settlement, they were not to be exercised after the determination of the limitations which they were

intended to overreach. To this there could be no objection: it would not affect any prior exercise of the power, although by will." Then he refers to one of the earliest cases upon this question, *Mortlock v. Buller*, 10 Ves. 292, in which a settlement had been made, and during the life of the tenant for life the life estate had united with the ultimate remainder, and he then observes: "The substantial ground upon which such a power in trustees should be held not to be subsisting is, that the intention of the settlement was to confine it to the time during which the uses of the settlement existed." Accordingly, it is well ascertained that, where there is a settlement of real estate, either by will or by deed, and the settlement ultimately carries the land to a person entitled in fee simple, and there are powers couched in general words and without limitation as to time, which are, nevertheless, obviously intended to be exercised only during the subsistence of the intermediate limitations, there, the moment the estate in fee is vested,

the powers are at an end, because it was the intention of [*628] *the settlement that they should subsist only during the intermediate limitations, and therefore in that case the vesting of the estate absolutely in the persons ultimately entitled is an indication that, according to the true construction of the settlement, the intention of the settlor, with regard to the powers, has come to an end. That is an illustration of the principle that you must look at the intention of the settlor or testator. Another case recently decided may be referred to to show the way in which the Court looks at the intention. In *Peters v. Leves and East Grinstead Railway Company*, 18 Ch. D. 429, a power was created for the purpose of dividing the property amongst the persons who were ultimately to take it absolutely. If the Court had there held that the absolute vesting of the ultimate interests had put an end to the power, they would have defeated the object and intention of the creator of the power, and, accordingly, the Court held that the power subsisted, notwithstanding that the ultimate estates had vested absolutely.

So here, the question is, what was the intention of the settlor or revisor? To my mind that is reasonably apparent. The testator was possessed of a large building estate, called "the Bow Common estate," which he gave to certain trustees, who are the present applicants, upon trust to raise the sum of £30,000 by mortgage, and then he indicated a period which was to run from his death to

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the expiration of twenty-one years from the death of the survivor of all the persons named in his will. The object of so limiting that period was to keep the estate together for the purpose of management, as long as the law would permit. He then gave the benefit of the estate to his wife for her life, with remainder in undivided eighths, which are stated to have become vested in persons who are now *sui juris*. During the term to which I have already referred he directed the trustees to manage the estate. The object of the testator is made plain by the recital which is contained in the will. [His Lordship read the recital, which is stated above.] He, therefore, clothes his trustees during the period to which I have referred with very ample and very specific powers of management. They may enter into contracts for building, they may build, they may lay out roads, they may make advances to builders, they may lease, and lastly, they may * sell; and [*629] it is under that power of sale that the present contract has been made. Moreover, the testator by his will created a special fund, which he called his "Bow Common estate capital," which was to be used by the trustees during this period as the capital for carrying on building operations upon this estate, and it was ultimately to vest in a manner corresponding with the limitations of the estate.

Nothing can be more plain, to my mind, than the intention of the testator that, during the period to which I have referred, the estate and the fund should be managed together by the trustees as a common concern, in order to utilise and improve the estate. That was his intention, and it would be a violation of his intention if I were to hold that it had come to an end by the absolute vesting of the beneficial shares. Nothing could be more inconvenient than for persons entitled to undivided eighths to have the management and carrying on of a concern of this kind. The case is very similar to that which would have occurred if the testator, being the owner of a business and land connected with it, had vested the business in trustees for the purpose of their carrying it on during the same period. It would be very difficult in such a case to say that the intention of the testator was that the power should come to an end when the beneficial interests in the business had become absolutely vested.

The question, therefore, in my judgment, being merely one of intention, I conclude that the intention of this testator was that

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this enterprise should be carried on during that period which he has indicated. It has not been suggested that that period transgresses the law against perpetuities, and, therefore, it is valid. I am not deciding that the persons beneficially interested might not at any moment put an end to the power and the trusts connected with the term; but there is no suggestion that they have yet done so. The power must, therefore, be assumed to be still subsisting, and the trustees can make a good title under it, without the concurrence of any one else.

ENGLISH NOTES.

It will be seen that the proposition stated in the first part of the rule is assumed in the principal case to be settled law. If more direct authority for it is required, it will be sufficient to refer to the judgments in *Wheate v. Hall* (1811), 17 Ves. 80, and *Wolley v. Jenkins* (1856), 23 Beav. 53, affirmed (1857) 5 W. R. 281. The principal case sufficiently illustrates the criteria for ascertaining whether the rule is applicable in a particular case.

AMERICAN NOTES.

In *Chamberlain v. Taylor*, 36 Hun (N. Y.), 24, where a testator bequeathed and devised all his real and personal estate, not before specifically bequeathed and devised, to his executors in trust for the payment of the bequests and legacies thereinbefore specified, and for the purpose of executing such trust, authorized and empowered them to sell and convert all his real and personal estate into cash, and execute and deliver the necessary conveyances and assignments, it was held the power of the executors to sell the testator's real estate ceased as soon as all the legacies and bequests specified in the will had been paid and discharged.

In *Ward v. Barrows*, 2 Ohio State, 241, 251, it was held that a power given to executors by will to sell and convey land, becomes legally inoperative and ceases to exist when the estate is settled, or all claims against it are presumptively satisfied by lapse of time, and no object of the testator remains to be attained. "In the construction of these powers, as well as in all the other provisions of the will, the intent of the testator is to be regarded, and, whenever it appears that the object for which the power is given has been accomplished, or has become impossible, the power itself ceases to exist."

In *Smith v. Taylor*, 21 Illinois, 296, where a will authorized the executor to sell real estate *at any time*, the Court said that those general words must be restricted by construing them in subordination to the trusts and provisions of the will, and that when the time during which the intention of the testator could have been accomplished, has passed, the power ceases to exist.

In *Jackson v. Jansen*, 6 Johnson (N. Y.), 73, a testator authorized his executors to sell his real estate, and directed them to invest the proceeds and

No. 1. — M'Gahey v. Alston. — Rule.

pay the interest annually to his wife, and after the latter's death, to turn over the principal to his son. After the widow's death, the surviving executor undertook to exercise the power of sale. The Court held that, as the testator's object in creating the power was to make a provision for his wife, the power ceased at her death.

See further, to the effect that a power ceases to exist when its objects are accomplished, or when they become impossible of attainment, *Fritsch v. Klausing*, 13 Southwestern Rep. (Ky. 1890), 241; *Hoffman v. Hoffman*, 66 Maryland, 568; *Sharpsteen v. Tillou*, 3 Cowen (N. Y.), 651; *Hetzell v. Barber*, 69 New York, 1; *Hovey v. Chisolm*, 56 Hun (N. Y.), 328; *Derereux v. Dunn*, 2 Iredell Eq. (N. Car.) 206; *Swift's Appeal*, 87 Pennsylvania State, 502; and other cases cited in 18 Am. & Eng. Encycl. of Law, 1st ed. 998-1001.

In the following recent cases it was held that the purpose for which the power was given had not been accomplished, and that consequently the power still subsisted. *Johns Hopkins University v. Middleton*, 76 Maryland, 186; *Cruikshank v. Parker*, 52 New Jersey Eq. 310; *Cussack v. Tweedy*, 126 New York, 81.

PRESCRIPTION.

See "AIR," 2 R. C. 558 *et seq.*; "CUSTOM," *passim*, 8 R. C. 275 *et seq.*; Nos. 1 & 2 of "ANCIENT LIGHT" and notes 3 R. C. 1 *et seq.*; No. 3 of "EASEMENT," 10 R. C. 22; No. 7 of "EASEMENT" and notes 10 R. C. 79 *et seq.*; No. 8 of "EASEMENT" and notes 10 R. C. 98 *et seq.*; No. 12 of "EASEMENT" and notes 10 R. C. 218 *et seq.*; No. 18 of "EASEMENT" and notes 10 R. C. 273 *et seq.*; No. 19 of "EASEMENT" and notes 10 R. C. 279 *et seq.*

PRESUMPTION.

See "DEATH (PRESEMPION OF)," 8 R. C. 512 *et seq.*; see Nos. 36 & 37 of "EVIDENCE" and notes 11 R. C. 518 *et seq.*; No. 38 of "EVIDENCE," 11 R. C. 541 *et seq.* And see references under "PRESCRIPTION," *supra*.

No. 1. — M'GAHEY v. ALSTON.

(1836.)

RULE.

Omnia præsumentur rite esse acta. A public officer who is proved to have acted as such is presumed to have been duly appointed to the office until the contrary is shown.

No. 1. — *M'Gahey v. Alston*. 2 Mees. & Wels. 206, 207.

M'Gahey v. Alston.

2 Meeson & Welsby, 206-214.

Presumption. — Acting Public Officer. — Primâ facie Evidence of Appointment.

[206] To an action brought by the vestry clerk of the parish of St. Pancras, under a local Act, the defendant pleaded that the plaintiff was not vestry clerk : — *Held*, that evidence of his acting as vestry clerk was sufficient *primâ facie* evidence of his appointment.

Debt on bond, dated the 1st of January, 1834, given by the defendants to the directors of the poor of the parish of St. Pancras, and their successors, in the penal sum of £500. Pleas — 1st, that the plaintiff was not vestry clerk of the parish; [*207] 2ndly, that the defendant Alston *had duly fulfilled the conditions of the bond. The replication took issue on these pleas. There had been a third special plea, to which there was a demurrer, and which, on argument in Easter Term last, was held to be bad (see 1 M. & W. 386). The cause was tried at the sittings at Westminster in Trinity Term last, before GURNEY, B., when the dispute was as to the defendant Alston's right to retain a certain sum of money for his salary as vestry clerk. It appeared that he had been appointed paying agent or clerk for the parish, a Mr. Scadding being at that time the vestry clerk, and that no money was ever paid without the order being countersigned by the vestry clerk. Scadding having resigned the situation of vestry clerk, the directors of the poor passed a resolution, that the defendant should be appointed temporary vestry clerk, which recommendation the vestry subsequently adopted, but they also came to a resolution that the salary should be reduced from £500 to £300 a year. The plaintiff contended that the reduction was to date from the resignation of Scadding; but the defendant claimed the higher salary up to the time when that resolution was passed. Accordingly, he retained in his hands the sum of £34 5s., which was according to the higher rate, entering it in his accounts as paid to himself for his salary. His accounts were submitted to a committee of the vestry, who examined them, and, as the defendants contended, assented to them. They were afterwards sent to the auditors, and one of them signed the accounts. Alston was, however, ultimately dismissed from the office of vestry clerk, and

No. 1. — *M'Gahey v. Alston*, 2 Mees. & Wels. 207-209.

the vestry refused to ratify his accounts. For the purpose of proving the first issue, the plaintiff himself was called as a witness,¹ and stated that he was the vestry clerk of the parish, and acted as such. It was objected that this was not admissible evidence * in proof of the issue, and that the ap- [* 208] pointment ought to be proved; but the objection was overruled. . . . The jury having found a verdict for the plaintiff,

Sir W. W. Follett, in the same term, moved for a new trial, on the ground that evidence had been improperly received. . . . First, the issue being whether the plaintiff was vestry clerk, it was incumbent upon him to prove, by proper evidence, that he had been duly appointed to that office, as by producing the books containing the appointment by the vestry: it was not sufficient to prove merely that he had acted as vestry clerk. [PARKE, B. — Why should not the acting in a character of that sort be sufficient evidence of his having been duly appointed? In actions against magistrates, constables, and the like, it is sufficient to prove that they acted as such.] Here his right to bring the action depends upon his being vestry clerk; unless he be legally invested with that office, the action must fail. Suppose he had brought an action for slander of him in his office, he must have proved his appointment. *Sellers v. Till*, 4 B. & Cr. 655; *Collins v. Carnegie*, 1 Ad. & Ell. 695, 3 Nev. & Man. 703. [PARKE, B. — The plaintiff fills a public * character. In *Cunell v. Curtis*, [* 209] 2 Bing. (N. C.) 228, 2 Scott, 379, TINDAL, Ch. J., intimates a strong opinion that even in an action for a libel, it is only necessary for the plaintiff to prove that he acted in the character in relation to which the words are written. Here the action is not brought for the plaintiff's benefit, but merely in his name. I have always thought that where an action is brought by a public officer, it is sufficient to prove his acting in that capacity.] It is submitted that that is not so where his title is the foundation of the action. In the case of an action brought by an attorney, it is necessary to prove that he is an attorney on the roll. So in the case of assignees of a bankrupt. In *Curtis v. The Kent Water Works Company*, 7 B. & Cr. 314, where the plaintiff was entitled to sue in the character of treasurer to certain commissioners, and the Act directed that the commissioners, or the major part of

¹ Made a competent witness by sect. 16 of the St. Pancras Vestry Act, 59 Geo. III. c. xxxix.

them, assembled at any meeting, not being less than thirteen, might by writing under their hands, appoint a treasurer; it was held that an appointment, signed by a majority of seventeen commissioners, was valid, and that it need not be signed by thirteen. That point would not have arisen, if acting in the office alone were sufficient. When an Act requires a written appointment, and directs it to be entered in the books, and makes the books evidence of the appointment, it is in all cases necessary to produce them to prove the appointment. [BOLLAND, B. — In *Berryman v. Wise*, 4 T. R. 366, BULLER, J., said, that in the case of all peace officers, justices of the peace, constables, &c., it was sufficient to prove that they acted in those characters, without producing their appointments.] . . .

[211] PARKE, B. — I think that the first objection which has been taken is not a valid objection, and that proof of acting was sufficient. The plaintiff is a public parochial officer; and the rule is, that all public officers who are proved to have acted as such, are presumed to have been duly appointed to the office, until the contrary is shown. It is quite immaterial that the action is brought in the name of the officer. In all actions against justices and constables, no more is requisite than proof of their acting in those characters. With respect to the second objection, that Bradley was not a competent witness, the case which has been referred to, of *Fletcher v. Greenwell*, 1 Cr. M. & R. 754, is a distinct authority to show that the witness was competent. Then the third question is, whether Alston was substantially entitled to retain the sum of £34 5s. for his salary. He *claimed it as having been allowed by the directors; but the directors had no power to settle the amount of the salary; that belonged to the vestry. But he further insists that it has been adopted and allowed by the vestry on the settlement of his accounts. It appears, however, that at the time when these accounts were produced, this item was objected to, and in fact it never was allowed. But even if it had, I should have felt much doubt whether such an officer could exonerate himself by a payment, which, at the time he made it, he knew to be illegal. What the defendant did was equivalent to payment to a third person, of money which he knew that person was not entitled to demand. On these points, therefore, I think there should be no rule. . . .

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No. 1. — *M'Gahey v. Alston.* — Notes.

ENGLISH NOTES.

The above case is given as one of general application to public officers. The cases relating to particular offices are collected in Taylor on Evidence, sect. 171, 9th ed. p. 47. They include Lords of the Treasury, deputy County Court Judges, commissioners for taking affidavits, sheriffs, justices of the peace, constables, &c.

The general application of the principal case was considered and affirmed in *M'Mahon v. Lennard* (H. L. 1858), 6 H. L. C. 970, a case where the plaintiff claimed to have been appointed for life to the office of weighmaster in a market town in Ireland, and sued for disturbance in his office. The LORD CHANCELLOR (LORD CHELMSFORD) (6 H. L. C. at p. 1000) said: "The case upon which the plaintiff relied was his having acted as weighmaster, and having been treated as a person acting in that capacity by Thomas Lennard (one of the defendants). There is no doubt that in the case of a public officer, it is in general not necessary to show his appointment, but his acting in the office will be sufficient proof, and that whether the question arises incidentally or is directly in issue, as in *M'Gahey v. Alston*, or is a necessary part of the title to recover as in *Doe v. Barnes* (1846), 8 Q. B. 1037; and I think that a weighmaster of a market town may be considered a public officer for this purpose, as much as the vestry clerk, under a local Act, as in *M'Gahey v. Alston*, or the church-wardens, as in the case of *Doe v. Barnes*."

AMERICAN NOTES.

American cases illustrating the doctrine of the rule are *Shelbyville v. Shelbyville*, 1 Metcalfe (Ky.), 54; *Hutchings v. Van Bokkelen*, 34 Maine, 126; *Commonwealth v. McCue*, 16 Gray (Mass.), 226; *Commonwealth v. Kane*, 108 Massachusetts, 423; *State v. Holcomb*, 86 Missouri, 371; *Forsaith v. Clark*, 21 New Hampshire, 409, 423; *State v. Roberts*, 52 New Hampshire, 492; *Briggs v. Taylor*, 35 Vermont, 57. See 1 Greenleaf on Evidence, 16th ed. sect. 38 a.

In *Commonwealth v. Kane*, *supra*, GRAY, J., said: "The foundation of the rule of evidence, that a person acting as a public officer has been duly appointed to the office which he assumes to exercise, is that all acts done by what appears to be public authority are presumed to be rightly done, until the contrary is proved. *Omnia presumuntur rite esse acta donec probetur in contrarium.*"

It is not, in general, necessary to prove the written appointment of public officers. *Jacob v. United States*, 1 Brockenbrough (U. S. Circ. Ct.), 520, 528; *Inhabitants of New Portland v. Inhabitants of Kingfield*, 55 Maine, 172; *Webber v. Davis*, 5 Allen (Mass.), 393; *Commonwealth v. Tobin*, 108 Massachusetts, 426; *State v. Findley*, 101 Missouri, 217; *Woodsey v. Village of Rondout*, 4 Abbott's App. Dec. (N. Y.) 639; *State v. Taylor*, 70 Vermont, 1.

No. 2. — Carter v. Murcot, 4 Burr. 2162-2165. — Rule.

"From the strong presumption arising from the undisturbed exercise of a public office, that the appointment to it is valid, it is not, in general, necessary to prove the written appointments of public officers. All who are proved to have acted as such are presumed to have been duly appointed to the office, until the contrary appears; and it is not material how the question arises, whether in a civil or criminal case, nor whether the officer is or is not a party to the record: unless, being plaintiff, he unnecessarily avers his title to the office, or the mode of his appointment." 1 Greenleaf on Evidence, 16th ed. sect. 563 g.

In *Webber v. Davis, supra*, it was held that in an action upon a recognizance, it is not necessary, in order to show the authority of the magistrate who took it, to produce his commission in Court; but his authority may be shown by parol proof of his acts in that capacity. The Court, per CHAPMAN, J., said: "The plaintiff called Horace H. Coolidge as a witness, to testify that he was a commissioner of insolvency in the county of Suffolk, and acted as such on the 19th of March, 1861. To this the defendant objected, not on the ground that the proof of his acting as such was insufficient, but on the ground that his commission was the best evidence. It is well settled that it is not, in general, necessary to prove the written appointment of public officers. All who are proved to have acted as such are presumed to have been duly appointed to the office, until the contrary appears."

No. 2. — CARTER v. MURCOT.

(K. B. 1768.)

No. 3. — BECKETT v. CORPORATION OF LEEDS.

(1872.)

RULE.

THE ownership of land bounded by a stream (not navigable) or highway, is presumed to extend *usque ad medium filum*. But the presumption may be rebutted by evidence.

Carter v. Murcot.

4 Burr. 2162-2165.

[This case will be found reported as No. 1 of "FISHERY," 12 R. C. 166.]

No. 3. — *Beckett v. Corporation of Leeds*, L. R. 7 Ch. 421, 422.**Beckett v. Corporation of Leeds.**

L. R. 7 Ch. 421-427 (s. c. 26 L. T. 375; 20 W. R. 454).

Soil of Highway. — Right of Adjoining Landowner ad medium filum viae. [421]
— Street in a Town. — Borough English Tenure. — Presumption.

The right of the owner of land abutting on a highway to the soil of the highway *ad medium filum viae* is founded on a presumption of law which exists only in the absence of evidence of ownership.

Whether such presumption has any application to a street in a town, *quære*.

Held, in a suit between the lords of the manor and the corporation of Leeds, that the soil of the Briggate, an ancient street in the borough of Leeds, belonged to the lords of the manor, there being sufficient evidence to rebut the presumption of ownership in the owners of the adjoining houses.

Decision of Lord ROMILLY, M. R., reversed.

This was an appeal from a decision of the MASTER OF THE ROLLS.

The bill was filed by Sir Thomas Beckett and Mr. H. C. M. Ingram, lords of the manor of Leeds, against the mayor and burgesses of the borough of Leeds, to enforce specific performance of an agreement dated the 20th of December, 1867, whereby the plaintiffs agreed to sell to the defendants the soil of part of the ancient street called the Briggate, in Leeds, in front of two plots of land abutting on the street, together with the right of making cellars under that portion of the street.

The corporation did not dispute the title of the plaintiffs as lords of the manor, but they alleged that the soil of the street comprised in the agreement was not vested in the lords of the manor, but belonged to the corporation, who were owners of the two plots of land adjacent thereto.

The greater part of the town of Leeds, including Briggate, is within the manor of Leeds. Briggate, which is one of the oldest streets in Leeds, is a very wide street, being, on an average, sixty-five feet in width. In former times fairs and markets were held in that street, leaving sufficient roadway in the centre for traffic. Stallage and pickage and other tolls were paid to the lords of the manor in respect of such markets until the sale thereof to the corporation in the year 1654.

By a charter dated the 11th of November, 1208 (the ninth year * of King John), Maurice Paganel, then lord of [* 422] the manor, "granted and confirmed to his burgesses of Leeds and their heirs liberty and free burgage, and their tofts.

and with each such toft half an acre of arable land, to hold of him and his heirs in fee and by inheritance, freely, peaceably, and honourably to pay to him and his heirs, for each such toft and half acre, sixteen pence at Pentecost and the Feast of St. Martin" (*Wardell's Municipal History of Leeds*, App. iv.).

By a royal charter of the 13th of July, 1626 (the 2nd of Charles I.), confirmed and renewed by a royal charter of the 13th of Charles II., the mayor, aldermen, and burgesses of Leeds were incorporated, and a grant was made to the corporation of the right of holding a market, and of the tolls, stallage, and other profits thereof (*ibid.* App. xxi. lxii.). In later times a market was held on a strip of land in the centre of Briggate, but for many years this market had been discontinued.

On the 22nd of September, 1694, the lords of the manor granted to H. Gilbert and G. Sorocold, their heirs, executors, administrators, and assigns, licence, power, and authority to dig up any of the streets and highways in Leeds, to lay pipes, and do all things necessary for carrying on certain waterworks for supplying the town with water, in consideration of a yearly rent of £3.

Subsequently the waterworks became vested in the corporation, who paid the rent of £3 to the lords of the manor till the year 1858, when they purchased the rent for £75.

Evidence was given by the plaintiffs of a few cases in which the owners of houses abutting upon Briggate had paid a small fine or rent to the lord in respect of encroachments. It was, however, alleged by the defendants that, in numerous other cases, owners of houses had made cellars and other encroachments on the soil of the street without interference from the lords of the manor.

Under these circumstances Lord ROMILLY, M. R., came to the conclusion that the soil of the street belonged to the owners of the tenements abutting on the street, and that the plaintiffs had not proved their title: and the plaintiffs appealed from this decision.

Evidence was adduced before the LORDS JUSTICES to show that all, or the great majority, of the tenements abutting on [423] Briggate, *including the plots of land in question, were of borough English tenure.

The Solicitor-General (Sir G. Jessel), Sir R. Baggallay, Q.C., and Mr. North, for the appellants:—

The presumption of law that a grant of land abutting on a road

No. 3. — *Beckett v. Corporation of Leeds*, L. R. 7 Ch. 423, 424.

passes the soil *ad medium filum viæ* has never been held to apply to grants of houses in a town, and it is especially inapplicable to grants of burgage tenements. It is a presumption which in any case may be rebutted by evidence to show that the grantor had no intention to grant such a right. In the present case there is such evidence, for the course of dealing with the streets shows that all parties considered that the right to the soil was vested in the lords, not in the owners of the adjoining houses. *Attorney-General v. Chambers*, 4 De G. & J. 55; *Lord v. Commissioners of Sydney*, 12 Moo. P. C. 473; *White v. Hill*, 6 Q. B. 487; *Squire v. Campbell*, 1 My. & Cr. 459.

Sir Roundell Palmer, Q.C., Mr. Bagshawe, and Mr. Graham Hastings, for the Corporation of Leeds:—

There is no trace in the authorities of the distinction suggested by the other side between a grant of an ordinary piece of land and a tenement in a town. The presumption of law that the road passes *ad medium filum* can only be rebutted by distinct evidence, and the evidence here is unsatisfactory. Even where the parcels have been described by boundaries, it has been held that the soil of the road passed: *Berridge v. Werd*, 10 C. B. (N. S.) 400; and the presumption is applicable to all tenures. *Doe v. Pearsey*, 7 B. & C. 304 (31 R. R. 209); *Marquis of Salisbury v. Great Northern Railway Company*, 5 C. B. (N. S.) 174.

There is no evidence that there was a street where these houses now stand before the original grant of the tenements; but if there was a street the houses could not have been contiguous, for each tenement had half an acre of arable land. The presumption is that the street was made by the owners of the tenements. With respect to the evidence in modern times of the existence of rights * in the lords of the manor, we contend that it is [*424] ambiguous and inconclusive.

Sir R. Baggallay, in reply, as to costs.

Sir W. M. JAMES, L. J.:—

In this case I am of opinion that the lords have made out a very clear and satisfactory title to the piece of ground in question. A good deal of the argument has turned upon what is supposed to be the rule of law as to the presumption that closes extend *ad medium filum viæ*, and it is said that this presumption is to be applied to such a house as this in Leeds, with respect to the wide space

between this house and the houses on the opposite side of the road. The rule, as laid down in *Lord v. Commissioners of Sydney*, 12 Moo. P. C. 473, in which case the matter was probably more fully considered than in any other, is, that in all these cases you must have regard to the circumstances in which the words were used. The learned Judge who there gave the judgment of the Court, Sir JOHN COLERIDGE, says this: "If lands were described as bounded by a house, no one could suppose that the house was included in the grant; but if lands granted were described as bounded by a highway, it would be equally absurd to suppose that the grantor had reserved to himself the right to the soil *ad medium filum*, in the far greater majority of cases wholly unprofitable." I should myself, if it were necessary to determine it, be very slow to come to the conclusion that where there is a road going through an estate, and a site is granted by the road-side for the erection of a cottage or house, and a cottage or house is built upon that site, the mere conveyance, or grant, or demise of a piece of land as the site of and for the purpose of building a house is, in presumption of law, a grant to the middle of the highroad, the frontage of which is probably the origin of the house being built on that space. It appears to me that a great many inconveniences might arise from the notion that a mere grant or demise of such a site would of itself raise a presumption of law which deprives the owner of the estate of his possessory title or of his freehold in respect of the half of the highway.

[*425] *But the present case stands in this way: These were really not houses, according to the evidence before us, originally built by the side of the mere highway, to which the rule could be at all applied. It appears now quite clear that there is a very wide open space, about sixty feet wide, between the houses — a space which was kept and used for fairs and markets, which fairs and markets were the fairs and markets of the lord, and continued to be the fairs and markets of the lord for several centuries after the time at which the space came into existence. It appears to me that in such a case to presume that where the lord of the borough had allowed his dependent burgesses to have what is called a toft fronting towards the market-place and fair-place, which was also used as a road, and then by a grant enlarged the tenure of that toft into a fee simple tenure in borough English, the lord intended to grant, or that the tenant intended to take,

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the half of the vacant space between the one row of tofts and the other row of tofts, would be to make a presumption inconsistent with common sense and inconsistent with the meaning which the common usage of mankind would apply to such a grant.

But besides this — there being nothing but the presumption, or supposed presumption, in favour of the owner of the house — there is beyond all question the fact that the lord has received, for a great number of years, a substantial money profit for the use of part of the soil of the road in question. It is a sum of three guineas a year, and no doubt that is not a very large sum, but it is a substantial sum, which the lord has received, latterly from the corporation, before that from individuals who were speculatively engaged in establishing works for the benefit of the town, and which must have been received, as it appears to me, with the full knowledge of everybody connected with the town of Leeds at the time. Then, in addition to that, the lord has received a sum in respect of the encroachments upon part of this very street, one or two upon the street called Briggate, one or two more upon that which, if not strictly part of Briggate, is, at all events, a continuation of the same line of road towards the country.

It appears, therefore, to me that the lord has had a practical enjoyment of the profits of the thing itself, as against which there * is no evidence of enjoyment of any profit [* 426] or of any right which can be considered as adverse to the title of the lord.

Under these circumstances I am of opinion that a good title has been shown by the plaintiffs. I am also of opinion that a good title was shown before the institution of the suit.

Sir G. MELLISH, L.J. :—

I am of the same opinion. Looking at the nature of the property, namely, a road which passes between houses with respect to which you cannot expect to prove the property in it by the ordinary tests of ownership, I think that the lord has really made out an extremely strong case.

In the first place, I agree that, looking at what we know about the land in question in ancient times, there is no presumption that each toft went to the middle of the highway. I think it is clearly to be presumed that the road between the tofts must have existed from time immemorial, because the fairs and markets must

be presumed to have been from time immemorial. As regards the markets, it is expressly recited in the charter of Charles I. that they had existed from time immemorial, and the fairs must have existed likewise from time immemorial, because there is no trace of any grant. Then in the time of King John, there is a small town with a market-place and a fair-place in the middle of it, a small portion only of which was probably occupied as a highway at that time, but with spaces between used for the common benefit of the public; and the franchise of the markets and fairs was in the lord.

Then we find that at some time, certainly before the time of King John, there were granted out tofts simply by the rod, at will in the first instance, and then as burgage tenements. Then is it to be presumed that the lord intended to grant the actual soil of all that space which was dedicated to the use of the public, and which was to be used for the purpose of markets and fairs? It appears to me it is extremely improbable that it could have been intended at that time to do so, and that, whatever may have been the presumption at that time, the acts of ownership since have been very strong indeed. The lord having granted the right to

lay down water pipes in all the streets in Leeds, and having received *an annual payment for years in respect of such pipes, is very strong evidence. So also is the granting the liberty to make encroachments in the streets, and receiving payments, some fixed and some annual, for such encroachments.

Then what is there on the other side? Nothing but the most slight evidence of small encroachments in very modern times, and we have to decide this, in fact, as jurymen, and say whether, on this evidence, we ought to find in favour of the lords of the manor. When we are considering what happened in ancient times, we cannot always make out what was the actual truth, but we must make up our minds how to act upon such evidence as we can get: and in this particular case I am convinced that the soil in the ancient streets did belong to the lord, and that up to a very modern period that was the universal opinion in Leeds, and that it is only in modern times that doubts have been cast upon it.

Under these circumstances I am of opinion that a jury would properly come to a conclusion in favour of the lords, and that if they did not, a common law Court would send back the case for a new trial.

ENGLISH NOTES.

The presumption that a grant by deed of a close, described as bounded by a river, passes half the bed of the river, so as to give a right of fishery to the grantee, may be rebutted, not merely by words in the deed itself, but by showing the circumstances under which the deed was executed. *Duke of Devonshire v. Pattison* (1887), 20 Q. B. D. 263, 57 L. J. Q. B. 189, 58 L. T. 392.

AMERICAN NOTES.

The presumption of ownership to the middle of a non-navigable stream or a highway is fully recognized in this country. "Land covered by fresh-water streams, not navigable, is *primâ facie* the property of the riparian owners, *usque ad filum aquæ*." Jones on The Law of Real Property in Conveyancing, sect. 180, and cases cited. "Where a highway is the boundary between two estates, it is presumed that the fee of the soil, with the minerals under it, belongs to the adjoining owners *usque ad medium filum viæ*; and a person holding lands bounded on a highway is held *primâ facie* to own to the centre of the highway, subject to the easement of the right way." 4 Am. & Eng. Encycl. of Law, 2nd ed. 809-810.

That a deed of land bounded on a non-navigable stream or on a highway passes the grantor's title as far as the centre of the stream or highway, unless a contrary intention appears, is conclusively settled, by a great number of American cases, many of which are cited in Jones on Real Property, sect. 448, 484; 4 Am. & Eng. Encycl. of Law, 2nd ed. 810-811, 828 *et seq.*; 10 Lawyers' Reports Annotated, 207; 27 American State Reports, 56.

That these presumptions are rebuttable is clear. Thus, in *Smith v. Slocomb*, 11 Gray (Mass.), 280, it was held that the presumption that the title of the owner of land bounding on a highway extends to the centre of the way is rebutted by the production of a deed from which he derives his title, granting the land to the side of the way only.

One who conveys land bounding on a non-navigable stream or a highway may of course reserve to himself the soil in the bed of the stream or in the way, and the language of the deed may be such as to rebut the presumption that it is included. The question as to what words are sufficient for this purpose is thoroughly discussed, with full citation of authorities, in Jones on Real Property, sects. 454-465, 488 *et seq.*

Where the deed describes the land as "bounded by," or "bounded on," or "running along" a highway, it conveys title to the centre, though the dimensions given would exclude the highway. *Henderson v. Halterman*, 146 Illinois, 555; *Newhall v. Iveson*, 8 Cushing (Mass.), 595; *White v. Godfrey*, 97 Massachusetts, 472. On the other hand, where the words are "by the side," "by the margin" or "by the line" of the highway, it is generally held that a sufficient intention to exclude the soil of the highway is shown. *Walker v. Pearson*, 40 Maine, 152 (but see *Low v. Tibbetts*, 72 Maine, 92; 39 American Reports, 303); *Hamlin v. Pairpoint Mfg. Co.*, 141 Massachusetts, 51; *Lough*

Nos. 2, 3. — *Carter v. Murcot*; *Beckett v. Corporation of Leeds*. — Notes.

v. Machlin, 40 Ohio State, 332; *Buck v. Squiers*, 22 Vermont, 481. But see *Paul v. Career*, 26 Pennsylvania State, 223; *Cox v. Freedley*, 33 Pennsylvania State, 124, 129. A similar construction is placed on the language of deeds conveying land bounded on streams. *Dunlap v. Stetson*, 4 Mason (U. S. Circ. Ct.), 349; *Bradford v. Cressey*, 45 Maine, 9; *Lunt v. Holland*, 14 Massachusetts, 150; *Hatch v. Dwight*, 17 Massachusetts, 289; 9 American Decisions, 145; *Sleeper v. Laconia*, 60 New Hampshire, 201; *Starr v. Child*, 20 Wendell (N. Y.), 149; *Child v. Starr*, 4 Hill, 369; *Luce v. Carley*, 24 Wendell (N. Y.), 451; 35 American Decisions, 637; *Halsey v. McCormick*, 13 New York, 296.

By the common law, a navigable stream meant a stream in which the tide ebbed and flowed. In dealing with the great rivers of this country, which are navigable in fact far above the flow of the tide, some Courts have clung to the letter of the common law in holding that the beds of all non-tidal rivers are subjects of private ownership, while others have departed from the common law notion sufficiently to hold streams to be navigable in law which are so in fact, regardless of the ebb and flow of the tide. The cases on both sides are collected in Jones on Real Property, sects. 480-481; 4 Am. & Eng. Encycl. of Law, 2nd ed. 823-828.

In *Monongahela Bridge Co. v. Kirk*, 46 Pennsylvania State, 112; 84 American Decisions, 527. READ, J., speaking for the Court, said: "We are aware that, by the common law of England, such streams as the Mississippi, the Missouri, the rivers Amazon and Platte, the Rhine, the Danube, the Po, the Nile, the Euphrates, the Ganges, and the Indus were not navigable rivers, but were the subject of private property; whilst an insignificant creek in a small island was elevated to the dignity of a public river, because it was so near the ocean that the tide ebbed and flowed up the whole of its petty course. The Roman law, which has pervaded Continental Europe and which took its rise in a country where there was a tideless sea, recognized all rivers as navigable which were really so; and this common-sense view was adopted by the early founders of Pennsylvania, whose province was intersected by large and valuable streams, some of which are a mile in breadth."

As to the question of boundaries on ponds and lakes, see Jones on Real Property, sects. 495-502; 4 Am. & Eng. Encycl. of Law, 2nd ed. 832-837.

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PRINCIPAL AND SURETY.

See also No. 45 of "BILL OF EXCHANGE," 4 R. C. 591 *et seq.*; "GUARANTEE," 12 R. C. 464 *et seq.*

No. 1. — **FORBES v. JACKSON.**

(1882.)

RULE.

A SURETY is entitled, on paying the debt, to stand in the same position as the creditor in respect of any securities held by the creditor for the same debt. In the meantime and as soon as his liability as surety becomes concurrent with the holding by the creditor of other securities for the debt, the surety has an inchoate right to the benefit of those securities, and this benefit is not prejudiced by any further charges subsequently created by the principal debtor in favour of the creditor over the property comprised in the securities.

Forbes v. Jackson.

19 Ch. D. 615-623 (s. c. 51 L. J. Ch. 690; 30 W. R. 652).

Mortgage of Premises and Policy. — Proviso for Redemption. — Surety. [615]
Covenant by, to pay Interest and Premiums. — Subsequent Advances by Mortgagee. — Payment of Interest and Premiums by Surety. — Right of Surety to a Transfer of the Securities.

In December, 1854, S. assigned certain premises and a policy of assurance to secure the repayment of a sum of £200 advanced to him by W., and interest. The proviso for redemption was that on payment of the money W. would reassign the premises and policy unto S., his executors, administrators, or assigns, or as he or they should direct. F., by the same indenture, as surety, covenanted, for himself only, with W. that while the £200 or any part should remain owing he would pay the interest and premiums, and he also assigned a policy on his own life, and covenanted to pay the premiums. W. at four different periods between May, 1856, and May, 1866, advanced moneys amounting

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to £530 to S. on the security of the same premises. S. made default [*616] in the payment of interest. W. died in 1878, and his executors * made a demand upon F. for all arrears, which he paid, and he also paid the premiums on the policy of S. : —

Held, that F. was entitled to have a transfer of all the securities on paying what was due upon the mortgage of December, 1854.

Williams v. Owen, 13 Sim. 597, not followed.

Newton v. Chorlton, 10 Hare, 646, followed.

Special case. By an indenture of lease dated the 1st of July, 1854, certain premises situate at Islington were demised by Henry Witten to William Spence, his executors, &c., for the term of ninety-five years from the 24th of June, 1852, subject to a yearly rent of £10 and the usual covenants.

By an indenture of mortgage dated the 28th of December, 1854, made between William Spence of the first part, the plaintiff, J. S. Forbes, of the second part, and A. Weir, of the third part, William Spence assigned the same premises unto A. Weir, his executors, &c., to secure the repayment of a sum of £200 and interest at 5 per cent; and he also assigned to Weir a policy of assurance on his own life for £250. The legal estate in the premises was at the date vested in the plaintiff as the surviving trustee of a marriage settlement made in September, 1854, but which had ceased to have any effect. The proviso for redemption of the premises and policy was that on payment by William Spence, his heirs, executors, administrators, or assigns, of the sum of £200 to A. Weir, his executors, administrators, or assigns, he or they would reassign the premises and policy “unto W. Spence, his executors, administrators, or assigns, or as he or they should direct.”

By the same indenture the plaintiff, for himself only, and not so as to bind his executors, covenanted with A. Weir, his executors, administrators, and assigns, that while the sum of £200, or any part thereof, should remain owing he would pay unto A. Weir, his executors, administrators, and assigns, interest at 5 per cent, and also pay the premiums on the policy of assurance; and as a further security for the payment of the interest and premiums the plaintiff assigned unto A. Weir a policy of assurance on his own life for £100, and covenanted to pay the premiums.

[*617] * The plaintiff joined in the mortgage as surety for William Spence, A. Weir having declined to advance the

No. 1. — *Forbes v. Jackson*, 19 Ch. D. 617, 618.

£200 to W. Spence unless the plaintiff entered into the covenants and made the assignment above-mentioned.

Subsequently to the 28th of December, 1854, *i.e.*, in May, 1856, August, 1863, August, 1864, and May, 1866, William Spence borrowed sums of money amounting to £530 from A. Weir, and by four indentures charged the same premises with the payment thereof and interest. The plaintiff had no knowledge of these advances having been made until the 6th of November, 1875. William Spence paid interest on the £200 until the 28th of June, 1867, and he also paid the premiums on his policy.

A. Weir died in September, 1878, having, by his will, made in 1874, appointed three executors, the defendants Jackson and Robins being two of them, and they, in September, 1878, made a demand upon the plaintiff for arrears of interest on the £200 from the 28th of June, 1867. The plaintiff paid the arrears, and also the interest which accrued due up to the 28th of December, 1879, under the mortgage of December, 1854, and he had also paid the premiums on the policy of assurance on the life of William Spence from the year 1868 up to the present time, and he had paid certain costs in connection with the mortgage.

On the 22nd of December, 1879, the plaintiff gave to the defendants Jackson and Robins notice of his intention to pay off the £200, and on the 28th of June, 1880, he, in pursuance thereof, tendered that sum, together with the half-year's interest, and offered to pay any costs properly payable in respect of the mortgage, and requested them to transfer to him all the securities comprised in the mortgage, including the leasehold premises, but they declined to accept the £200, and required the plaintiff not only to pay that sum, but also to pay the four other sums advanced to W. Spence, and the arrears of interest due thereon. They, however, offered to accept the £200, and to assign to the plaintiff the two policies of assurance, but they claimed to retain the leasehold premises as security for the further sums advanced.

The questions were, whether on payment by the plaintiff of the *£200, and the interest, premiums, and costs (if [* 618] any) due in respect of the mortgage of the 28th of December, 1854, he was entitled to have all or any of the securities comprised therein transferred to him, and to hold the same as security for the repayment of the sums paid by him under the mortgage; and by whom the costs of the action were to be borne.

No. 1. — *Forbes v. Jackson*, 19 Ch. D. 618, 619.

Kekewich, Q.C., and Hornell, for the plaintiff, having stated the facts of the case, were stopped by the Court.

W. Pearson, Q.C., and L. Field, for the defendants, the executors:—

The proviso for redemption states that the mortgagee would, at the request of W. Spence or his executors, reassign the premises and policy to him or them, or as he or they should direct. It was not a proviso in favour of the plaintiff, who was not a surety for payment of the £200, as he only covenanted that so long as any part of it remained owing he would pay the interest and the premiums on the policy, and the further advances were made by the mortgagee on the security of the premises some years before the plaintiff paid the arrears of interest. The decision in *Williams v. Owen*, 13 Sim. 597, is clearly in favour of the executors' contention that the plaintiff will not be allowed to redeem the mortgage without paying them the four other sums which the mortgagor charged upon the premises. That case has not been overruled. It was considered to be law in 1 Tudor's Leading Cases, 5th ed. p. 116, and was followed in the case of *Farebrother v. Wodehouse*, 23 Beav. 18-27.

[Kekewich, Q.C., referred to the decision in *Hopkinson v. Rolt*, 9 H. L. C. 514.]

That decision has no application here, as it was merely that further advances made with notice by the first mortgagee to the mortgagor cannot take priority over a second mortgage which was effected prior to the further advances. In this case the mortgagee,

when he advanced his money on the further charges, [* 619] * became an assign of the equity of redemption, and he is

entitled to priority over the plaintiff, who does not come within the proviso for redemption. Nor is the decision in *Bowker v. Bull*, 1 Sim. (N. S.) 29, an authority against the executors. The right to redeem and the right to call for a transfer of the securities were confounded there, and they are quite distinct rights, as pointed out in *Williams v. Owen*.

[HALL, V.-C. — Have you considered the decision in *Newton v. Chorlton*, 10 Hare, 646 ?]

That case was one in reference to releasing the surety, but here the question is as to the right of the plaintiff to redeem. • *Williams v. Owen* was commented upon in that case, but it was not overruled and it is, as submitted, still good law.

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[The case of *Dawson v. Bank of Whitehaven*, 4 Ch. D. 639; 6 Ch. D. 218, was also referred to.]

Theobald appeared for the defendant, W. Spence.

HALL, V.-C. :—

The arguments which have been submitted on behalf of the executors do not affect the conclusion which I, in the course of them, intimated that I had come to; nor do they affect the principle laid down in the case of *Newton v. Chorlton* to which I referred on Thursday last. I consider that the decision in that case is perfectly good law, subject to this observation, that Vice-Chancellor Sir W. PAGE WOOD expressed an opinion that where an additional security is taken by the creditor after the original security was given, and the contract of suretyship entered into, the right of the surety as regards the securities given to the principal creditor did not extend to the additional securities. The VICE-CHANCELLOR did not think that the cases went so far as to give a surety the benefit of the security subsequently taken by the creditor. But that is a view which never commended itself to me, and it was certainly not adopted by Lord Justice KNIGHT

BRUCE and * Lord Justice TURNER in a case before them of [*620] *Lake v. Brutton*, 8 D. M. & G. 441, and I may observe that Vice-Chancellor Sir W. PAGE WOOD himself, in a case afterwards before him of *Pledge v. Buss*, Joh. 663, 668, stated that his judgment in that case had been disapproved of by those LORDS JUSTICES, although not absolutely overruled. The VICE-CHANCELLOR added: "I am as much bound to submit to their opinion as if the decision had been reversed on appeal before them." The VICE-CHANCELLOR did not mention the names of the cases to which he referred, but I may state that some twenty years ago, in my copy of Mr. Johnson's reports, I noted against *Pledge v. Buss* the case of *Lake v. Brutton* as being the one which the VICE-CHANCELLOR had in his mind, and there is also another case of *Pearl v. Deacon*, 1 De G. & J. 461, which I thought was referred to by him. That was an appeal from a decision of the late MASTER OF THE ROLLS (Sir JOHN ROMILLY, 24 Beav. 186). It was the case of a subsequent security: but it is not material for my purpose to consider the general question whether there has been a release, or what is the effect of taking an additional security, and then whether that additional security should be held available for the benefit of the

 No. 1. — *Forbes v. Jackson*, 19 Ch. D. 620, 621.

surety. There has never been, so far as I know, any disapproval of the general principle which was laid down by the VICE-CHANCELLOR in *Newton v. Chorlton*, 10 Hare, 646, except so far, if at all, as the MASTER OF THE ROLLS may have dealt with it in *Farebrother v. Wodchouse*, 23 Beav. 18, where he seems to have followed the case relied upon here of *Williams v. Owen*, 13 Sim. 597, which certainly, if it were law, would be an authority in favour of the executors. In the case of *Newton v. Chorlton* the principle laid down by Vice-Chancellor Sir W. PAGE WOOD was that a surety was to have the benefit of all securities, "whether by way of suretyship or mortgage," and he afterwards added (10 Hare, 652): "The surety has a right at any moment to every security held by the creditor at the date of the contract—it has never yet gone beyond that; and he has further a right to say, you must always hold yourself in a position to be put in motion, at my request, against the principal debtor." I consider that [* 621] the decision * in *Newton v. Chorlton* was carried higher by the decision of the LORDS JUSTICES in *Lake v. Brutton*, which, as I have said, the VICE-CHANCELLOR himself recognised in *Pledge v. Buss*, and I consider the decision must be applicable to securities taken subsequently to the original mortgage. The MASTER OF THE ROLLS in *Farebrother v. Wodchouse* appears to have followed *Williams v. Owen*, as it applies to a subsequent security taken by the original creditor—that he could make advances to the debtor, and that they would prevail over the right of the surety. That principle is entirely at variance with the decision in *Newton v. Chorlton*, and it is a singular circumstance that in a subsequent case of *Drew v. Lockett*, 32 Beav. 499, before him, although he had followed *Williams v. Owen*, Lord ROMILLY said (32 Beav. 505): "I am of opinion that a surety who pays off the debt for which he became surety must be entitled to all the equities which the creditor whose debts he paid off, could have enforced, not merely against the principal debtor, but also as against all persons claiming under him." It was odd that Lord ROMILLY should agree with the principle laid down in *Newton v. Chorlton*, and yet come to a conclusion in *Farebrother v. Wodchouse*, which seems to be at variance with it. The principle on which Vice-Chancellor Sir W. PAGE WOOD proceeded was the same as laid down by Lord ELDON in the case of *Magheir v. Crickett*, 2 Sw. 185 (19 R. R. 57), which I consider a leading authority, and also laid

No. 1. — *Forbes v. Jackson*, 19 Ch. D. 621, 622.

down in earlier cases: — that the surety is entitled to have all the securities preserved for him, which were taken at the time of the suretyship, or, as I think it is now settled, subsequently. Nor does it matter at all in principle, whether the creditor takes a further security for further advances made prior to the time when the surety makes payment of the debt. They have nothing to do with the surety. He is entitled to the benefit of the securities, though his payment be not made until after the time when the further advances were made by the creditor. The principle is that the surety in effect bargains that the securities which the creditor takes shall be for him, if and when he shall be called upon to make any payment, and it is the * duty of the [* 622] creditor to keep the securities intact; not to give them up or to burden them with further advances. The same principle was enunciated in the case of *Duncan, For. & Co. v. North and South Wales Bank*, 11 Ch. D. 88, where the MASTER OF THE ROLLS on the hearing upon appeal from the judgment of Vice-Chancellor LITTLE, said (11 Ch. D. 95): "It cannot be said that in every instance a surety is entitled to stand in the place of the principal creditor as regards other securities. That is true as regards securities given by the debtor, but is not true as regards securities given by co-sureties." But here I have nothing to do with the question which was decided in that case, — a question between persons alleged to be co-sureties. That case was carried to the House of Lords, and is reported in 6 App. Cas. 1. The House of Lords, though they reversed the judgment of the Court of Appeal, did not say anything which affected the principle referred to by the MASTER OF THE ROLLS, and which is all that I desire to notice. I consider that the principle laid down in that case is perfectly plain and right; and also that the decision in *Williams v. Owen* is not law now, and cannot after the cases to which I have referred be followed. I decline to recognise it. There is another case to which I desire to refer, that of *Green v. Wynn*, L. R. 4 Ch. 204, in which there was a surety, and Lord HATHERLEY said (L. R. 4 Ch. 207), "but where there is a mortgage, of course any person under a liability to pay the interest would be at liberty to redeem." I am of opinion, therefore, that the plaintiff was right in his offer to pay off the debt, and that he is entitled to have the securities, and to say that the further charges for the sums subsequently advanced are inoperative as against him. The defendants, the executors,

No. 1. — *Forbes v. Jackson*, 19 Ch. D. 622, 623. — Notes.

having refused the offer made, and being wrong in insisting on retaining the securities for the subsequent advances, must pay the costs of the action.

The declaration will be that on payment to the executors of what shall be found due for principal, interest, and costs in respect of the mortgage of the 28th of December, 1854, the plaintiff is entitled to have the securities comprised in the deed transferred *to him, and to hold them as securities for the repayment to him of the sums which may be paid to the executors by him. The costs of the plaintiff will be deducted from the sum which he may be required to pay, as in *Wheaton v. Graham*, 24 Beav. 483; but the interest will not be stopped as from the date when the offer of payment was made.

ENGLISH NOTES.

The rule is in effect assumed throughout the judgments in the case of *Duncan, Fox, & Co. v. North and South Wales Bank*, referred to in the judgment in the principal case, at p. 613, *ante*, and fully reported on the appeal to the House of Lords as No. 45 of "Bill of Exchange," 4 R. C. 591.

It is not clear what Vice-Chancellor HALL intended by his reference to the *dictum* of the MASTER OF THE ROLLS in the case of *Duncan, Fox, & Co. v. North and South Wales Bank*, or what are the circumstances in which the MASTER OF THE ROLLS considered the principle would not apply to securities given by a co-surety. But it is clear that for the purpose and to the extent necessary for working out his equity of contribution from a co-surety, the surety paying the debt is entitled to stand in the place of the principal as to the securities given by the co-surety. *Ex parte Crisp* (1744), per Lord HARDWICKE, 1 Atk. at p. 135; *Grierside v. Benson* (1745), 3 Atk. 248; *Re Kirkwood's Estate* (1878), 1 L. R. Ir. 108; *Stirling v. Forrester* (1821), per Lord REDESDALE, 3 Bligh. at p. 590; and per Lord BLACKBURN in *Duncan, Fox, & Co. v. North and South Wales Bank*, 4 R. C. at p. 607 (6 App. Cas. at p. 19). Lord BLACKBURN cites, as confirming this view, the 5th section of the Mercantile Law Amendment Act, 1856 (19 & 20 Viet. c. 97), which, although sufficiently explicit upon this branch of the sureties' rights, is strangely ignored in some of the subsequent cases in Courts of equity.

AMERICAN NOTES.

A surety, on paying the debt for his principal, is entitled to be subrogated to all the securities, funds, liens, and equities which the creditor holds against the principal debtor, or as a means of enforcing payment from him.

No. 1. — *Forbes v. Jackson.* — Notes.

This right will be enforced whether the surety is bound in one instrument with the principal or not; and it will be transmitted to the surety's assignees, and to his creditors, when the principal demand has been so used as to destroy their subordinate liens upon his property, and to his heirs when necessary for their protection, and to his grantees, who have lost the property conveyed by him to them in consequence of its being taken upon the principal obligation. And the creditor must do nothing to defeat this right of subrogation on the part of the surety, or to vary the position of the surety; if he takes from the principal debtor a pledge or security for the debt, he must hold the same fairly and impartially, for the benefit of the surety, as well as for his own protection; and if he parts with such property without the knowledge and consent of the surety, he will lose his claim against the latter to the extent of the value of the property so surrendered. . . . But the surety cannot acquire by subrogation any greater rights than the creditor himself enjoyed." Sheldon on Subrogation, 2d ed. sect. 86.

Numerous American cases sustaining the surety's right of subrogation are collected in Sheldon, ch. iii.; Brandt on Suretyship and Guaranty, 2d ed. ch. xii.; 24 Am. and Eng. Encycl. of Law, 1st ed. pp. 194 *et seq.*; 1 Lawyers' Reports Annotated, 641. Late decisions are *Stokes v. Little*, 65 Illinois App. 255; *Peirce v. Garrett*, 65 Illinois App. 682; *Whitbeck v. Ramsay*, 74 Illinois App. 524; *Gilbert v. Adams*, 99 Iowa, 519; *Riggs v. Chapman*, 46 Southwestern Rep. 692 (Ky. 1898); *Hackett v. Watts*, 138 Missouri, 502; *Harper v. Kumbie*, 65 Missouri App. 514; *Ætna Insurance Co. v. Thompson*, 40 Atlantic Rep. 396 (N. H. 1894); *Sternbach v. Friedman*, 54 New York Supplement, 698; *Smith v. National Surety Co.*, 59 New York Supplement, 789; *Zuellig v. Hencarlic*, 60 Ohio State, 27; *Flood v. Hutter*, 32 Southeastern Rep. 64 (Va. 1898); *Myers v. Miller*, 45 West Virginia, 595; *Woods v. Douglas*, 33 Southeastern Rep. 771 (W. Va. 1899); Jones on Mortgages, sect. 874 *et seq.*

It is immaterial that the surety, when he entered upon the obligation, was unaware of the existence of the security. *Hevener v. Berry*, 17 West Virginia, 474.

By the English law before the Mercantile Law Amendment Act 19 & 20 Viet. ch. 97, sect. 5, the doctrine of subrogation did not extend to such securities as are *ipso facto* extinguished by the act of payment, as bonds or other specialties, and judgments. That Act changed the law of England in this respect. The prevailing American doctrine has always been that sureties will be subrogated in such cases, though the contrary view is taken in a few states. A thorough discussion of the subject will be found in Sheldon, sects. 136-138.

The principal case of *Forbes v. Jackson* is cited by Judge SHELDON, sect. 129, as authority for the proposition that: "If a creditor, holding a claim for which he has both collateral security from the principal debtor and also the engagement of a surety, acquires an additional claim against the same principal, to which the agreement upon which the security was taken does not extend, the surety will be entitled to the benefit of such security on payment of the first indebtedness alone, and can require the proceeds of such security, when realized by the creditor, to be applied upon the first indebtedness; for

No. 1. — *Forbes v. Jackson.* — Notes.

the surety's right of subrogation, when once vested, cannot be interfered with by the act of the creditor alone."

It has been held that the surety's right of subrogation to the securities held by the creditor is subordinate to a later charge taken by the creditor from the principal debtor in ignorance of the suretyship. *Oreis v. Newell*, 17 Connecticut, 97; *Budd v. Olver*, 148 Pennsylvania State, 194; Sheldon, sect. 111. In the first-named case, A. and B. made a joint and several note to C., and mortgaged six lots of land to him, three owned by A. and three by B. Shortly afterwards A. mortgaged one of his lots to D. to secure a debt due from A. C. then assigned the first note and mortgage to D. D. foreclosed the second mortgage, and then brought a bill against A. and B. to foreclose the first. B. was merely a surety for A., and hence claimed that, on paying the first mortgage only, he was entitled to stand in the place of the mortgagee, and hold the entire mortgaged premises for his indemnity. It was held that D. being a *bonâ fide* purchaser of the first mortgage without notice that B. was a surety, ought not to be subject to B.'s equitable claim.

But where the creditor, at the time of the creation of the subsequent charge, is aware of the facts creating the right of the surety to subrogation, the latter will not be affected by the later charge. *National Exchange Bank v. Silliman*, 65 New York, 475; *Schell City Bank v. Reed*, 54 Missouri App. 94; *Woods v. Douglas*, 33 Southeastern Rep. 771 (W. Va. 1899). See also *Prairie City Bank v. United States*, 164 United States, 227; *Ottawa Bank v. Dudgeon*, 65 Illinois, 11.

In *National Exchange Bank v. Silliman*, *supra*, the defendants indorsed a note for the accommodation of E. B., the maker, and S. E. B., the first indorser, which note was discounted by the plaintiff. The B.'s had deposited certain securities as collateral. Subsequent to the discount, plaintiff purchased an overdue note of the B.'s. In an action upon the defendants' indorsement it was held that they were entitled to have the proceeds of the collateral applied to the note on which they were liable, in preference to the later acquired note.

In *Schell City Bank v. Reed*, *supra*, it was held that a surety need not pay off a subsequent mortgage in order to be subrogated to the rights of the creditor under a prior mortgage given to secure the debt for which he became surety. The Court said: "The surety on the payment of the debt stands, as against the principal debtor, whose debt he has paid, in the shoes of the creditor, and can make available to his benefit all rights which the creditor could have enforced. In this case the creditor held a mortgage. It was a junior mortgage to that held by the county of St. Clair. The creditor's rights in respect to these was a right to redeem the prior county mortgage and to foreclose his own. To these rights the surety succeeded. No subsequent deal or manipulation of the securities without the consent of the surety could affect his rights, for such rights of his accrued *at the time* he entered into the obligation of surety. All mortgages or other securities held by the creditor are held by him as a trustee when dealing with the rights of the surety. He cannot without the surety's assent divert the securities to other purposes. Especially he cannot burden the securities with subsequent debts, for if he

No. 2. — Dering v. Earl of Winchelsea, 1 Cox, 318. — Rule.

could, the surety would be wholly in his power: nor can his assignee, with notice of the suretyship, do so. The surety may have entered into the obligation on the strength of the other securities held by the creditor. And whether his rights be partly contractual or wholly equitable, they have been long recognized and well established. . . .

"This question ought to be clearly determined from a consideration of the time when the sureties' rights accrue. We have stated that the rights of the surety accrue *at the time he enters into the obligation*, and when he pays the debt, it operates as an equitable assignment of all securities in the hands of the creditor *relating back to the time his obligation was incurred*, and carrying such securities as may be in the hands of the creditor's assignees, if they had notice of the relations. . . . And this rule applies where on the face of the papers the surety appears as principal, if in fact a surety, of which fact the assignee has notice."

In general, a person taking securities from the principal debtor, with notice of his responsibilities, is bound in equity to hold them for the indemnity of the surety. *Atwood v. Vincent*, 17 Connecticut, 575; *Peirce v. Higgins*, 101 Indiana, 178.

No. 2. — DERING v. EARL OF WINCHELSEA.
(1787.)

No. 3. — ELLESMERE BREWERY COMPANY v. COOPER.
(1895.)

RULE.

WHERE sureties are bound on behalf of the same principal for the same debt and under similar engagements (whether by the same instrument or by different instruments), a right to contribution arises between them, as the result of equity and for equalising the burden.

And where they are expressly bound as sureties in the same instrument, the right to contribution becomes an essential part of the contract.

Dering v. Earl of Winchelsea.

1 Cox, 318-323 (1 R. R. 41, White & Tudor, L. C. 6th ed. vol. 1, p. 122).

Sureties. — Contribution. — Equity.

The doctrine of contribution amongst sureties is not founded in [318] contract, but is the result of general equity on the ground of equality of

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burden and benefit. Therefore where three sureties are bound by different instruments, but for the same principal and the same engagement, they shall contribute.

Thomas Dering, Esq., having been appointed collector of some of the duties belonging to the customs, it became necessary upon such appointment for him to enter into bonds to the Crown with three securities for the due performance of this office. Sir Edward Dering, his brother, the Earl of Winchelsea, and Sir John Rous, having agreed to become sureties for him, a joint and several bond was executed by Thomas Dering and Sir Edward Dering to the Crown in the penalty of £4000, another joint and several bond by Thomas Dering and the Earl of Winchelsea, and a third by Thomas Dering and Sir John Rous in the same penalty of £4000, all conditioned alike for the due performance of Thomas Dering's duty as collector. Mr. Dering being in arrear to the Crown to the amount of £3883 14s., the Crown put the first bond in suit against Sir Edward Dering, and judgment was obtained thereon for that sum: whereupon Sir Edward filed this bill against the Earl of Winchelsea and Sir John Rous, claiming from them a contribution towards the sum so recovered against him.

[* 319] *The cause had been argued at length, in Michaelmas Term last, and now stood for judgment.

LORD CHIEF BARON. — This bill is brought by one surety against his two co-sureties, under the circumstances (above mentioned). Mr. Dering's appointment, the three bonds, and the judgment against the plaintiff, are in proof in the cause; the original balance due, and the present state of it, are admitted. The demand is resisted on two grounds: 1st, that there is no foundation for the demand in the nature of the contract; and 2ndly, that the conduct of Sir Edward Dering has been such as to disable him from claiming the benefit of the contract, though it did otherwise exist. There is also a formal objection which I shall take notice of hereafter. I shall consider the second ground of objection first, in order to lay it out of the case. The misconduct imputed to Sir Edward is, that he encouraged his brother in gaming and other irregularities; that he knew his brother had no fortune of his own, and must necessarily be making use of the public money, and that Sir Edward was privy to his brother's breaking the orders of the

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Lords of the Treasury, to keep the money in a particular box, and in a particular manner, &c. This may all be true, and such a representation of Sir Edward's conduct certainly places him in a bad point of view; and perhaps it is not a very decorous proceeding in Sir Edward to come into this Court under these circumstances: he might possibly have involved his brother in some measure, but yet it is not made out to the satisfaction of the Court, that these facts will constitute a defence. It is argued that the author of the loss shall not have the benefit of a contribution; but no cases have been cited to this point, nor any principle which applies to this case. It is not laying down any principle to say that his ill conduct disables him from having any relief in this Court. If this can be founded on any principle, it must be, that a man must come into a Court of equity with clean hands; but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; *it must be a depravity in a legal as well as in [*320] a moral sense. In a moral sense, the companion, and perhaps the conductor, of Mr. Dering, may be said to be the author of the loss, but to legal purposes, Mr. Dering himself is the author of it; and if the evil example of Sir Edward led him on, this is not what the Court can take cognisance of. Cases indeed might be put in which the proposition would be true. If a contribution were demanded from a ship and cargo for goods thrown overboard to save the ship, if the plaintiff had actually bored a hole in the ship, he would in that case be certainly the author of the loss, and would not be entitled to any contribution. But speaking of the author of the loss is a mere figure of speech as applied to Sir Edward Dering in this case. The real point is whether a contribution can be demanded between the obligors of distinct and separate obligations under the circumstances of this case. It is admitted that if there had been only one bond in which the three sureties had joined for £12,000, there must have been a contribution amongst them to the extent of any loss sustained; but it is said, that that case proceeds on the contract and privity subsisting amongst the sureties, which this case excludes; that this case admits of the supposition that the three sureties are perfect strangers to each other, and each of them might be ignorant of the other sureties, and that it would be strange to imply any contract as amongst the sureties in this situation; that these are

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perfectly distinct undertakings without connection with each other, and it is added, that the contribution can never be *codem modo*, as in the three joining in one bond for £12,000, for there, if one of them become insolvent, the two others would be liable to contribute in moieties to the amount of £6000 each, whereas here it is impossible to make them contribute beyond the penalty of the bond. Mr. Madocks has stated what is decisive, if true, that nobody is liable to contribute who does not appear on the face of the bond; if this means only that there is no contract, then it

comes back to the question, whether the right of contribution is founded on contract. [* 321] * If we take a view of

the cases both in law and equity, we shall find that contribution is bottomed and fixed on general principles of justice, and does not spring from contract; though contract may qualify it, as in *Swain v. Wall*, 1 Cha. Rep. 149. In the Register, 176 *b*, there are two writs of contribution, one *inter co-hei-eres*, the other *inter-cofeoffitos*; these are founded on the statute of Marlbridge; the great object of the statute is to protect the inheritance from more suits than are necessary. Though contribution is a part of the provision of the statute, yet in Fitz. N. B. 338, there is a writ of contribution at common law amongst tenants in common, as for a mill falling to decay. In the same page Fitzherbert takes notice of contribution between co-heirs and co-feoffees, and as between co-feoffees he supposes there shall be no contribution without an agreement, and the words of the writ countenance such an idea, for the words are "*ex eorum assensu*," and yet this seems to contravene the express provision of the statute: as to co-heirs, the statute is express; it does not say so as to feoffees, but it gives contribution in the same manner. In *Sir William Harbert's Case*, 3 Co. Rep. 11 *b*, many cases of contribution are put; and the reason given in the books is, that in *equali jure* the law requires equality: one shall not bear the burden in ease of the rest, and the law is grounded in great equity. Contract is never mentioned. Now the doctrine of equality operates more effectually in this Court, than in a Court of law. The difficulty in *Coke's Cases* was how to make them contribute; they were put to their *audita querelâ*, or *scire facias*. In equity there is a string of cases in 1 Eq. Ca. Abr. tit. "Contribution and Average." Another case occurs in Harg. Law Tracts on the right of the King on the prisage of wine. The King is entitled to one ton before the mast and one

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ton behind, and in that case a right of contribution accrues; for the King may take by his prerogative any two tons of wine he thinks fit, by which one man might suffer solely; but the contribution is given of course on general principles which govern all these cases. Now to come to the particular case of sureties; it is clear that one surety may *compel a contri- [* 322] bution from another towards payment of a debt to which they are jointly bound. On what principle? Can it be necessary to resort to the circumstance of a joint bond? What if they are jointly and severally bound? What difference will it make if they are severally bound, and by different instruments, but for the same principal and the same engagement? In all these cases the sureties have a common interest and a common burden; they are joined by the common end and purpose of their several obligations, as much as if they were joined in one instrument, with this difference only, that the penalties will ascertain the proportion in which they are to contribute, whereas if they had joined in one bond, it must have depended on other circumstances. In this case the three sureties are all bound that Mr. Dering shall account for the moneys he receives; this is a common burden; all the bonds are forfeited at law; and in this Court, as far as the balance due; the balance might have been so great as to have exhausted all the penalties, and then the obligee forces them all to pay; but here the balance is something less than one of the penalties. Now who ought to pay this? the one who is sued must pay it to the Crown, as in the case of prisage, but, as between themselves, there shall be a contribution, for they are in *æquali jure*. This is carried a great way, where they are joined in one obligation, for if one should pay the whole £12,000 and the second were insolvent, the third shall contribute a moiety, though he certainly never meant to be liable for more than a third: this circumstance, and the possibility of one being liable for the whole, if the other two should prove insolvent, suggested the mode of entering into separate bonds; but this does not vary the reason for contribution, for there is the same principal and the same engagement; all are equally liable to the obligee to the extent of the penalty of the bonds when they are not all exhausted: if, as in the common case of a joint bond, no distinction is to be made, why shall not the same rule govern here? As in the case of average of cargo in a Court of law, *qui sentit commodum sentire debet et onus*. This principle has a

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[* 323] direct application * here, for the charging one surety discharges the other, and each therefore ought to contribute to the *onus*. In questions of average there is no contract or privity in ordinary cases, but it is the result of general justice from the equality of burden and benefit: then there is no difficulty or absurdity in making a contribution take place in this case, if not founded on contract, nor any difficulty in adjusting the proportions in which they are to contribute; for the penalties will necessarily determine this.

The objection in point of form, which I before mentioned, is, that the bill cannot be sustained, inasmuch as it has not charged the insolvency of the principal debtor, and that such a charge is absolutely necessary. As a question of form, it ought to have been brought on by demurrer; but in substance the insolvency of Mr. Dering may be collected from the whole proceedings, which strongly imply it; for the plaintiff appears to have submitted to the judgment, and the defendants have made their defence on other grounds.

On the whole, therefore, we think that the plaintiff is entitled to the relief he prays, and declare that the balance due from Thomas Dering being admitted on all hands to amount to the sum of £3883 14s. 8½*d.*, the plaintiff, Sir Edward Dering, and the two defendants, the Earl of Winchelsea and Sir John Rous, ought to contribute in equal shares to the payment of that sum, and direct that the said plaintiff and defendants do pay in discharge thereof, each of them, the sum of £1294 11s. 7*d.* And that on payment thereof the Attorney-General shall acknowledge satisfaction on the record of the said judgment, and that the two bonds entered into by the Earl of Winchelsea and Sir John Rous be delivered up to them respectively. But this not being a very favourable case to the plaintiff, and the equity he asks being doubtful, we do not think it a case for costs.

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1896. 1 Q. B. 75-83 (S. C. 65 L. J. Q. B. 173; 73 L. T. 567; 44 W. R. 254).

[75] *Principal and Surety. — Co-Surety. — Contribution. — Material Alteration of Instrument. — Discharge.*

Where two or more persons join as sureties for a common principal, but bind themselves in different amounts, in the event of the principal being in default they are liable to contribute to the satisfaction of the creditor's

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claim in proportion to the limits of their respective liabilities, and not in equal amounts.

Four persons, as sureties for a principal, executed a joint and several bond of suretyship, by the terms of which the liability of two of them was limited to £50 each, and that of the other two to £25 each. One of those whose liability was limited to £50, after the other three had executed the bond, executed it himself, but added to his signature the words “£25 only.” The obligee accepted the bond so executed without objection, and subsequently the principal became in default:—

Held, that the effect of the added words was to make a material alteration in the bond, so that the three first signatories were thereby discharged from their obligation: and that as the last signatory only executed the bond as a joint and several bond, he also was not bound by it.

Appeal from county Court Judge of Shropshire.

The plaintiff company, having appointed the defendant Joseph Cooper as their traveller and agent, required him to give security for the faithful discharge by him of his duties. He accordingly procured the other defendants, Walter Nunnerley, Thomas Emberton, John Pay, and Arnold Bromfield to become sureties for him, and to join him in making a bond whereby they bound themselves jointly and severally to the plaintiffs in a sum of £150. The condition of the bond was that if Cooper should duly account for all moneys received by him as such traveller or agent, and faithfully discharge his duties in such capacities, the bond should be void; and it was thereby provided that the liability of Nunnerley and Emberton should be limited to the sum of £50 each, and that of Pay and Bromfield to £25 each. After Cooper, Emberton, Pay, and Bromfield had executed the bond, Nunnerley executed it, but when doing so added to his signature the words “£25 only.” The plaintiffs’ * manager, who witnessed all the [* 76] defendants’ signatures, accepted the bond so executed without protest. Subsequently Cooper failed to account to the plaintiffs for a sum of £48, and the plaintiffs sued Cooper and his four sureties upon the bond. The county Court Judge gave judgment against Cooper: but he gave judgment for the other four defendants on the ground that the addition of the words “£25 only” to the signature of Nunnerley was an alteration of the bond which materially affected the position of the sureties, and that they were consequently all, including Nunnerley himself, discharged from liability. The plaintiffs appealed.

A. T. Lawrence, for the plaintiffs. — The words added by Nun-

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nurley to his signature may be treated as though they did not appear upon the bond, for, being repugnant to the earlier part of the deed, they are void. Secondly, if they are to be regarded as an alteration of the bond, and as forming part of it, the alteration is not material, for it does not affect the rights or liabilities of the co-sureties. The sureties were, no doubt, entitled to contribution *inter se*; but the amount which each surety is liable to contribute is an equal share of the whole debt subject to this, that it must not exceed the maximum amount for which he is bound. In *Craythorne v. Svinburne*, 14 Ves. 160, at p. 169 (p. 636, *post*). Lord ELDON, referring to *Dering v. Earl of Winchelsea*, 1 Cox, 318 (p. 617, *ante*), treated that case as authority for the proposition that the right to contribute exists not only where the parties are bound in like sums, but also where "they are bound in different sums, except that contribution could not be required beyond the sums for which they had become bound." (See *White & Tudor L. C.* 6th ed. vol. 1, p. 122.) Therefore in this case each would be liable to contribute one-fourth of the debt, *i.e.* £12, which sum is less than the smaller sum for which Nunnerley bound himself. It must be conceded, however, that in Ireland it has been held, on the contrary, that co-sureties bound in different sums contribute in proportion to the amounts for which they are bound. *In re M'Donaghs*, 10 Ir. Rep. Eq. 269. But that case should [* 77] not be * followed. Thirdly, if the other three co-sureties are to be discharged, at any rate Nunnerley must be held to be bound; for he must be taken to have known what the legal effect of his addition to his signature upon the liabilities of his co-sureties would be, and he cannot take advantage of his own wrong.

Hansell, for the defendants.—First, the added words are an alteration of the deed, and have the same effect as though the "£50" set against Nunnerley's name in the body of the deed had been erased and "£25" inserted instead. The fact that the alteration comes after the signature is immaterial: see, per DOBBERIDGE, J., *Thompson v. Butcher*, 3 Bulst. 300, at p. 302. Secondly, the alteration is material, and in two respects. It affects the rights of the creditors. The fact that the creditors assented to it makes no difference; and this would have been so even though the alteration had not been to their prejudice. *Gardner v. Walsh*, 24 L. J. Q. B. 285; *Suffell v. Bank of England*, 9

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Q. B. D. 555. The alteration also affects the rights of the co-sureties, for it alters the proportion of their respective contributions. ALDERSON, B., in *Pendlebury v. Walker*, 4 Y. & C. (Exch.) 424, at p. 441, lays it down that "where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law superadds that which is not only the principle, but the equitable mode of applying the principle, that they should all contribute equally, if each is a surety to an equal amount; and if not equally, then proportionably to the amount for which each is a surety." Thirdly, if the three sureties who first executed the bond are discharged, Nunnerley also cannot be held bound; for it is not his deed. He only signed it conditionally on his co-sureties being bound.

A. T. Lawrence, in reply.

1895. Dec. 5. The judgment of the Court (Lord RUSSELL of Killowen, Ch. J., and CAVE, J.) was read by

Lord RUSSELL of Killowen, Ch. J. — This was an action against Cooper and four other defendants who had signed a bond as sureties for Cooper. At the trial before the learned *county [*78] Court Judge, judgment was given for the plaintiffs as against Cooper, and judgment was given for the four remaining defendants as sureties.

The facts were that Cooper, having become agent and traveller for the plaintiffs, was called upon to give them some security. He accordingly gave the bond in question, in which he was joined by the four other defendants.

The bond was dated April 30, 1894. By its terms the five defendants were jointly and severally bound to the plaintiffs in the sum of £150. It then recited that Cooper had been appointed agent for the company, and stated the condition of the bond to be that, if Cooper duly accounted for all moneys received by him for the plaintiffs, and otherwise performed the duties of his agency, the bond should be void. It then provided that the liability of Nunnerley and Emberton (two of the defendants) should be limited to £50 each, and that of Pay and Bromfield (two other of the defendants) to £25 each. The effect, therefore, of the bond, as drawn, was that the principal and the sureties were jointly and severally bound in the sum of £150, but that liability could not be enforced against any of the sureties beyond the limit of the

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sum specified as to each of them. Nunnerley was the last to sign, and his signature thus appears on the bond: "Walter Nunnerley, twenty-five pounds only." The witness to the execution of each of the signatures was Mr. Bruce, the plaintiffs' manager, who, so far as appears, took the bond without making any objection to the manner of Nunnerley's execution; nor was it suggested that Nunnerley had surreptitiously added the qualification of "twenty-five pounds only" to his signature. As no evidence was given on the point, it cannot be assumed that Nunnerley in bad faith sought by the form of his execution of the bond to limit any liability he had previously agreed to undertake. The probability is that in giving particulars of his sureties Cooper had erroneously stated that Nunnerley had agreed to undertake liability to the extent of £50, whereas he had done so only to the extent of £25. Subsequently Cooper, the principal, received moneys of the plaintiffs to the amount of £48 for which he had failed to account;

and judgment was given against him at the trial for that [*79] *amount. The contested question was the liability of the other defendants, the sureties. The learned county Court Judge held that no one of them was liable, and gave judgment for them accordingly. The present appeal is against that judgment.

It was argued for the plaintiffs (1) that the form of Nunnerley's execution did not constitute an alteration of the bond so as to discharge from liability the three prior executing sureties: (2) that, if an alteration, it was not a material alteration, and therefore did not discharge such sureties; and, lastly, (3) that in any case Nunnerley was liable to the extent of £50, or if not of £50, at least to the extent of £25.

In my judgment, no one of these contentions is well founded. I think the effect of Nunnerley's mode of execution, on the facts of this case, is substantially the same as if the proviso in the body of the bond had been altered by him before execution by him by striking out £50 and inserting instead £25. It was, therefore, an alteration. Its effect I shall presently discuss.

The argument of the learned counsel for the appellant was, that the loss in question was to be divided into fourths, and that so long as each fourth did not exceed the sum for which each surety had become liable, each of them was bound to pay, and without any right to contribution from his co-sureties, whether the fixed

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limit of his liability was for the greater or the smaller amount. Here it was said the one-fourth of the loss was £12, and as Nunnerley had clearly intended to make himself liable, as also had Pay and Bromfield, for £25 each, it was immaterial whether Nunnerley signed for £25 or for £50. Each, it was contended, was bound to pay £12; and Emberton was bound to bear no more of the loss than the others.

In my judgment, this contention is founded on a misapprehension of the law. It renders it necessary to consider the principle upon which liability of sureties *inter se* rests. That principle is, that sureties for the same principal and for the same engagement, even although bound by different instruments and for different amounts, have a common interest and a common burden; so that if one surety who is directly liable to the creditor pays such creditor, he can claim contribution from his co-sureties whose obligation to the creditor he has discharged. * But [* 80] how is the amount of the claim to be determined? According to the argument of the learned counsel for the plaintiffs, it is to be determined by the number of the sureties. Thus, if there are four sureties and one of them pays all, he can recover one-fourth, and one-fourth only, of his payment from each of the other three co-sureties. But this is not in all cases true, even where each of the sureties has made himself liable for the same amount. Thus, where four sureties are jointly and severally bound in a surety bond, and one of them pays the amount of the bond, but one of the remaining three sureties is insolvent, the right to contribution against the two other sureties is for thirds, not for fourths, of the sum paid. But how is the amount to be determined, where, although the sureties are jointly and severally bound, there are different limits of liability, as in this case? It is clear that where the full amount of the bond is due and payable to the creditor, that liability can only be enforced against each surety to the limit of the liability fixed in the instrument. In such case there would be no right of contribution, for each would have paid to the limit of his liability. But suppose only half the amount of the bond is due and payable to the creditor, and such amount is paid by one only of the sureties, who has fixed the limit of his liability at one-half the amount of his bond. Could it be said that he had no right to any contribution from his co-sureties? Surely not. The burden is a common burden of all, but unequally distributed.

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By his payment of the loss of one-half the surety has discharged a liability which might have been enforced against the other sureties up to the fixed limit. It would be against all equitable principles that in such a case the other sureties should go free because it happened that the creditor had enforced payment against one only. Again, it is clear that one surety cannot keep for his own sole benefit a security for his suretyship where he is bound with other sureties for the same principal and the same engagement. Suppose, then, that one surety, whose limit of liability was £1000, has realised £1000 from such security, being bound with three other sureties with a limit of liability of £2000 each, making [*81] in all £7000. It is clear that that £1000 must be taken *into account for the benefit of all such sureties *inter se*. But upon what principle? Surely upon the only principle which will secure its equitable division, namely, proportional distribution. Thus the surety for £1000 would benefit to the extent of one-seventh, and each of the others to the extent of two-sevenths each. The same principle must apply where the burden has to be distributed. Where the claim of the creditor is to the full amount, each must pay up to the fixed limit of his liability; but where the claim is less than such full amount, and is discharged by one, the claim must be proportionately borne by the others, even where the claim does not exceed the fixed limit of the liability of the surety who has paid.

What I have so far said is, I think, to be gathered from the principles laid down in *Dering v. Winchelsea*, 1 Cox, 318 (p. 617. *ante*); but in *Pendlebury v. Walker*, 4 Y. & C. (Exch.) 424, ALDERSON, B., expressly states the rule thus: "Where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law superadds that which is not only the principle, but the equitable mode of applying the principle, that they should all contribute equally if each is a surety to an equal amount; and if not equally, then proportionably to the amount for which each is a surety." In *Steel v. Dixon*, 17 Ch. D. 825, at p. 830, FRY, J., cites with approval the language I have quoted; and, later, PEARSON, J., in *In re Arcedeckne*, 24 Ch. D. 709, at p. 714, adopts the language of FRY, J. (See also *Ellis v. Emmanuel*, 1 Ex. D. 157, and *Evans v. Bremeridge*, 2 K. & J. 174.)

Apply this principle to the present case. I assume the bond to have been executed according to its original tenor without qualifi-

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cation or alteration. The total loss being £48, Emberton, having subscribed for £50 out of the total of £150, would be liable for one-third; and if he paid no more he would have no claim for contribution; if he paid to the plaintiff more than one-third, he could claim contribution from his co-sureties in the proportion of their subscription. Stated as a sum in proportion, Emberton's liability would be arrived at thus: As 150 is to 50 so is 48 to the result. So worked out, Emberton * would be liable [*82] for £16 only, and if he paid more would have a claim for contribution. In like manner Pay and Bromfield would be liable for £8 each, and Nunnerley for £16. Now, to appreciate the materiality of the alteration, let us consider its effect upon the liability of Nunnerley. He explicitly says, "I execute the bond only on the terms of my liability being limited to £25." He could not, therefore, in any case be made liable for more. Whether he can be made liable even for the £25, I shall presently consider. What, then, is the effect of the altered limitation to £25 by Nunnerley upon the position of the other three sureties? Take Emberton's position. For simplicity, assume that the total liability to the plaintiff company for £48 has been paid by Emberton. According to the tenor of the bond without the alteration, Emberton would have to bear two-sixths, — equal to one-third of the loss; Nunnerley two-sixths, — equal to one-third; and Pay and Bromfield one-sixth each. But by the alteration it is manifest that Emberton, who has paid, would not have the same right of contribution against Nunnerley, and if Nunnerley is not bound at all, would have no right of contribution against him. The alteration was then clearly material. It is unnecessary to give similar illustrations as to Pay and Bromfield. The result, therefore, is that neither Emberton, Pay, nor Bromfield can be made liable on this bond. Each of them is entitled to say, "The contract into which I entered was on the basis of Nunnerley being a party to it with a liability of £50. That is not the contract as it now appears from the bond, and I am, therefore, not bound by it." Their position would be still stronger if Nunnerley is not bound by the bond at all. The remaining question then is — Is Nunnerley bound at all? I have already intimated, that as he has expressly said, "I shall be liable only for £25," he cannot be made liable for the £50; but is he liable even for the £25? I think he is not. He, in good faith, expressly limits his liability to £25; but he undertakes that

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liability not as a separate or independent liability, but as part of a contract in which three other sureties are joining him, against whom in certain eventualities he will have rights of recourse, between whom and himself a common burden is to be [* 83] borne, although unequally * distributed. But if in fact such sureties are not bound by the contract (and we have adjudged that they are not), Nunnerley is entitled to say, "This is not the contract into which I have entered, and I am not bound by it."

The judgment of the learned county Court Judge must stand, and the appeal will therefore be dismissed with costs.

Appeal dismissed.

ENGLISH NOTES.

The principles on which the right of a co-surety to contribution are well explained by Lord BLACKBURN in his judgment in *Duncan, Fox, & Co. v. North and South Wales Bank*, No. 45 of "Bill of Exchange," 4 R. C. at p. 607 (6 App. Cas. at p. 19). And see note to preceding rule (p. 614, *ante*).

The case of *Craythorne v. Swinburn*, referred to by Lord BLACKBURN (4 R. C. 607), is fully set out as No. 6, at p. 636, *et seq.*, *post*.

The general principle is again affirmed in the judgment of the Judicial Committee in *Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 755, 52 L. J. P. C. 65, 49 L. T. 315. But it is there decided that where the surety contracts only severally, and it is no part of the contract with him that another shall be joined as surety, the creditor does not break that contract by releasing another several surety; and that such release forms no ground for the first surety to contend that he is released.

The principle that the execution of a joint and several bond by one is presumed to be conditional on the execution by the others is again confirmed in the Irish case of *Fitzgerald v. M'Curran*, 1898, 2 Ir. R. 26.

AMERICAN NOTES.

"Where there are two or more sureties for the same principal debtor, and for the same debt or obligation, whether on the same or on different instruments, and one of them has actually paid or satisfied more than his proportionate share of the debt or obligation, he is entitled to a contribution from each and all of his co-sureties, in order to reimburse him for the excess paid over his share, and thus to equalize their common burdens." Pomeroy, *Equity Jurisprudence*, 2nd ed. sect. 1118.

The surety's right to contribution from his co-sureties has been sustained in a multitude of American cases, which are collected in Brandt on Suretyship

Nos. 2, 3. --- **Dering v. Earl of Winchelsea : Ellesmere Bry. Co. v. Cooper. — Notes.**

and Guaranty, 2nd ed. ch. xi.; Baylies on Sureties and Guarantors, ch. xv.; Story, Equity Jurisprudence, 13th ed. sects. 493 *et seq.*; 10 American State Reports, 639; 21 Am. & Eng. Encycl. of Law, 1st ed. pp. 809 *et seq.*; 7 Am. & Eng. Encycl. of Law, 2nd ed. pp. 331 *et seq.* As to redemption of mortgages, see Jones on Mortgages, sect. 1089.

The principle was thus enunciated by KENNEDY, J., in *Aigneu v. Bell*, 4 Watts (Penn.), 31, 32: "It is certainly a rule too well established now to be questioned, that where any one or more of those who are co-sureties have had to pay, as such, the debt of their principal, or any part thereof, and he is unable to reimburse it, the loss arising therefrom must be borne equally by all of them. Hence has arisen the right to contribution. This right has been considered as dependent rather upon a principle of equity than upon contract; but it may well be considered as resting alike on both for its foundation; for although, generally, there is no express agreement entered into between joint sureties, yet from the uniform and almost universal understanding which seems to pervade the whole community, that from the circumstance alone of their agreeing to be, and becoming accordingly co-sureties of the principal, they mutually become bound to each other to divide and equalize any loss that may arise therefrom to either or any of them, it may with great propriety be said that there is at least an implied contract. . . . This liability between sureties to contribution, in case of loss through the inability of their principal to pay, being known to them at the time of their becoming sureties, may well be considered a great, if not the main inducement, in many instances, to their becoming such."

If sureties are bound for the debt on default of the same person, in reference to the same transaction, they are liable to contribute to each other, although they are bound by different instruments. *Powell v. Powell*, 48 California, 231; *Monson v. Drakeley*, 40 Connecticut, 552; 16 American Reports, 74; *Golsen v. Brand*, 75 Illinois, 148; *Bosley v. Taylor*, 5 Dana (Ky.), 157; 30 American Decisions, 677; *Armitage v. Pulver*, 37 New York, 494; *Bell v. Jasper*, 2 Iredell Eq. (N. Car.) 597; *Pickens v. Miller*, 83 North Carolina, 543. And it is immaterial that each of the sureties is ignorant that the other is bound with him on the same obligation. *Chaffee v. Jones*, 19 Pickering (Mass.), 260; *Warner v. Morrison*, 3 Allen (Mass.), 566; *Norton v. Coons*, 3 Denio (N. Y.), 130; *Schram v. Werner*, 85 Hun (N. Y.), 293; *Wells v. Miller*, 66 New York, 255; *Durbin v. Kinney*, 19 Oregon, 71; *Stout v. Faus*, 1 Robinson (Va.), 169, 179; *Stovall v. Border Grange Bank*, 78 Virginia, 188.

In *Norton v. Coons*, *supra*, BRONSON, Ch. J., said: "The doctrine of contribution among sureties is founded on a general principle of equity and justice. Sureties are in *equali jure*, and must bear the burden equally. Contribution may be enforced whether they were bound jointly or severally; by the same, or by different instruments; and although the party who sues did not know at the time he became a surety, that the defendant was also a surety. The order of time in which they became bound is not a material inquiry. The only question is, whether they were in fact sureties for a principal debtor, and in relation to one and the same transaction."

No. 4. — *Davies v. Humphreys*, 6 Mees. & Wels. 153-167. — Rule.

No. 4. — *DAVIES v. HUMPHREYS*.

(1840.)

No. 5. — *WOLMERSHAUSEN v. GULLICK*.

(1893.)

RULE.

A SURETY has no right to a judgment for contribution until he has paid a larger sum than his proportion of the debt then actually due to the creditor.

But the Court under its equitable jurisdiction may declare the right to contribution, and make a prospective order under which the surety, on payment of any sum beyond his share, may be indemnified by his co-surety.

Davies v. Humphreys.

6 Meeson & Welsby, 153-170.

Co-surety. — Contribution. — When Right of Action attaches.

[153] By a promissory note, E. H., W. D. (the plaintiff), & J. H., jointly and severally promised to pay to J. E. £300, with interest. W. D., having paid the whole amount due, brought an action against J. H. to recover contribution from him "as a co-surety."

The amount of principal and interest had been paid by the plaintiff more than six years before the commencement of the suit, with the exception of £30, which was paid by him within that period. The Statute of Limitations having been pleaded: *Held*, that the plaintiff was entitled to recover only to the extent of £30 which had been paid within the six years, and that the Statute of Limitations was a bar to the rest, as the right of action attached as soon as the plaintiff had paid more than his proportion.

The nature of the action, so far as relates to the point of the rule, is sufficiently stated in the judgment of the Court delivered by

[167] PARKE, B. — This was an action by the plaintiff against the defendant, his co-surety on a promissory note, dated the 27th of October, 1827, for the sum of £300, with interest, to recover a moiety of the whole amount which he had paid to the payee. A rule granted in this case, as well as one which was granted in another action on the same note against the principal, was argued

No. 4. — *Davies v. Humphreys*, 6 Mees. & Wels. 167-169.

in the sittings after Trinity Term. In the course of the last term,* the Court disposed of the rule in the latter [* 168] action, and one of the questions in this, having reserved for further consideration the question, at what time the right of one co-surety to sue the other for contribution arises.

This right is founded not originally upon contract, but upon a principle of equity, though it is now established to be the foundation of an action, as appears by the cases of *Correll v. Edwards*, 2 Bos. & P. 268, and *Craythorne v. Swinburne*, 14 Ves. 160 (p. 630, *post*); though Lord ELDON has, and not without reason, intimated some regret that the Courts of law have assumed a jurisdiction on this subject, on account of the difficulties in doing full justice between the parties. What then is the nature of the equity upon which the right of action depends? Is it that when one surety has paid any part of the debt, he shall have a right to call on his co-surety or co-sureties to bear a proportion of the burden, or that, when he has paid more than his share, he shall have a right to be reimbursed whatever he has paid beyond it? or must the whole of the debt be paid by him or some one liable, before he has a right to sue for contribution at all? We are not without authority on this subject, and it is in favour of the second of these propositions. Lord ELDON, in the case of *Ex parte Gifford*, 6 Ves. 805 (6 R. R. 53), states that sureties stand with regard to each other in a relation which gives rise to this right amongst others, that if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion which, in all events, he is to pay: and he expressly says, "that unless one surety should pay more than his moiety, he would not pay enough to bring an assumpsit against the other." And this appears to us to be very reasonable: for, if a surety pays a part of the debt only, and less than his moiety, he cannot be entitled to call on his co-surety, who * might himself subsequently pay an equal or greater por- [* 169] tion of the debt; in the former of which cases, such co-surety would have no contribution to pay, and in the latter he would have one to receive. In truth, therefore, until the one has paid more than his proportion, either of the whole debt, or of that part of the debt which remains unpaid by the principal, it is not clear that he ever will be entitled to demand anything from the other; and before that, he has no equity to receive a contribution, and consequently no right of action, which is founded on the

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equity to receive it. Thus, if the surety, more than six years before the action, have paid a portion of the debt, and the principal has paid the residue within six years, the Statute of Limitations will not run from the payment by the surety, but from the payment of the residue by the principal, for until the latter date it does not appear that the surety has paid more than his share. The practical advantage of the rule above stated is considerable, as it would tend to multiplicity of suits, and to a great inconvenience, if each surety might sue all the others for a rateable proportion of what he had paid, the instant he had paid any part of the debt. But, whenever it appears that one has paid more than his proportion of what the sureties can ever be called upon to pay, then, and not till then, it is also clear that such part ought to be repaid by the others, and the action will lie for it. It might, indeed, be more convenient to require that the whole amount should be settled before the sureties should be permitted to call upon each other, in order to prevent multiplicity of suits; indeed, convenience seems to require that Courts of equity alone should deal with the subject; but the right of action having been once established, it seems clear that when a surety has paid more than his share, every such payment ought to be reimbursed by those who have not paid theirs, in order to place him on the same footing. If we adopt this rule, the result will be, that here, [* 170] the whole of what * the plaintiff has paid within six years will be recoverable against the defendant, as the plaintiff had paid more than his moiety in the year 1831; and consequently the rule must be absolute to increase the amount of the verdict from £15 to £30. *Rules accordingly.*

Wolmershausen v. Gullick.

62 L. J. Ch. 773-781 (S. C. 1893, 2 Ch. 514; 68 L. T. 753).

[This case will be found reported as No. 2 of "Indemnity," 12 R. C. 823.]

ENGLISH NOTES.

The common law decision of *Davies v. Humphreys* was, in effect, followed in the bankruptcy case of *In re Swardon, Ex parte Swardon* (C. A. 1881), 17 Ch. D. 44, 50 L. J. Ch. 540, 44 L. T. 830, 29 W. R. 654, where it was held that a surety who had not actually paid more than his share was not entitled, under the Bankruptcy Act of 1869 to

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present a bankruptcy petition against his co-surety. This decision would doubtless apply to a bankruptcy petition under the Act of 1883.

The judgment of Mr. Justice WRIGHT in *Wolmershausen v. Gullick*, which will be found at length under No. 2 of "Indemnity," 12 R. C. 823 *et seq.*, contains an exhaustive review of the cases in equity applicable to the right of contribution. The authority of this decision has been recognised in several subsequent cases. See *Robinson v. Harkin*, 1896, 2 Ch. 415, 65 L. J. Ch. 773, 74 L. T. 777, 44 W. R. 702; *Gardner v. Brooke*, 1897, 2 Ir. R. 6; *Fitzgerald v. McConran*, 1898, 2 Ir. R. 1, 13.

AMERICAN NOTES.

A surety's right of action against his co-sureties for contribution arises only when he has paid more than his share of the debt. *Taylor v. Means*, 73 Alabama, 468; *Pegram v. Riley*, 88 Alabama, 399; *Lytle v. Pope*, 11 B. Monroe (Ky.), 297; *Smith v. State*, 46 Maryland, 617; *Mason v. Lord*, 20 Pickering (Mass.), 447; *Backus v. Cogur*, 45 Michigan, 584; *Magruder v. Admire*, 4 Missouri Appeals, 133; *Fletcher v. Grover*, 11 New Hampshire, 368; 35 American Decisions, 497; *Morgan v. Smith*, 70 New York, 537; *Camp v. Bastwick*, 20 Ohio State, 337; 5 American Reports, 669; *Darbin v. Kaucy*, 19 Oregon, 71; *Gross v. Davis*, 87 Tennessee, 226; 10 American State Reports, 635; *Glasscock v. Hamilton*, 62 Texas, 143, 166; *Gordon v. Rice*, 86 Virginia, 853; *Shoemaker v. Stimson*, 16 Washington, 1; *Bushnell v. Bushnell*, 77 Wisconsin, 435.

The Statute of Limitations begins to run in favor of co-sureties against a claim for contribution only from the time of the payment by the surety. *Broughton v. Robinson*, 11 Alabama, 922; *Preslar v. Stallworth*, 37 Alabama, 402; *May v. Fann*, 15 Florida, 553; *Preston v. Gould*, 61 Iowa, 44; *Wood v. Leland*, 1 Metcalf (Mass.), 387; *Singleton v. Townsend*, 45 Missouri, 379; *Sherrod v. Woodard*, 4 Devereux Law (N. Car.), 360; 25 American Decisions, 714; *Leak v. Cowington*, 99 North Carolina, 559; *Martin v. Frantz*, 127 Pennsylvania State, 389; *Knotts v. Butler*, 10 Richardson Eq. (S. Car.) 143; *Beck v. Tarrant*, 61 Texas, 402; *Bushnell v. Bushnell*, 77 Wisconsin, 435. See note in 61 American Decisions, 504.

If a surety pays less than the whole debt, he can recover from his co-sureties only the amount he has paid in excess of his share. *Morgan v. Smith*, 70 New York, 537; *Byram v. McDowell*, 15 Lea (Tenn.), 581; *Goulden v. Trenholm*, 25 South Carolina, 362.

If he has bought the claim of the creditor at a discount, he is entitled to contribution only to the amount he has actually paid. *Faselier v. Babineau*, 11 Louisiana Annual 764; *Stclair v. Redington*, 56 New Hampshire, 146; *Tarr v. Ravenscroft*, 12 Gratton (Va.), 642.

If the surety has paid the debt in land, its actual value is the basis upon which contribution can be enforced. *Hickman v. McCurdy*, 7 J. J. Marshall (Ky.), 555. See also *Jones v. Bradford*, 25 Indiana, 305.

Before payment of the debt, one surety may maintain a bill in equity against his co-sureties to compel them to contribute with him towards its payment.

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Hgde v. Tracy, 2 Day (Conn.), 491; *Morrison v. Popple*, 7 Dana (Ky.), 307; *Ferrer v. Barrett*, 4 Jones Eq. (N. Car.) 455; *McKenna v. George*, 2 Richardson Eq. (S. Car.) 15. See also *Hodgson v. Baldwin*, 65 Illinois, 532.

In *Bowen v. Hoskins*, 15 Mississippi, 183, it was held that, where one of two sureties has made, or is about to make, a secret or fraudulent disposition of his property, so as to throw the burden of the debt on his co-surety, the principal debtor being insolvent, a Court of equity, on application of the surety thus endangered, will restrain such disposition or relieve against it if made. The Court said: "While at law, the surety has no remedy until he has paid the debt, equity, with a view of placing the performance of the duty where it primarily belongs, will interpose, at the instance of the surety, so soon as the debt becomes due, to compel its payment by the principal. . . .

"Although the question is new and without precedent in the books, so far as we have been able to see, this equity is quite as strong in favor of a surety (where the principal is insolvent) against his co-surety. It is well supported by authority, and thoroughly approved by the reason, that if the principal has made, or is about to make, secret or fraudulent dispositions of his property, so as to throw the debt upon his surety, the latter may have ample remedy. If the principal is insolvent, and therefore the debt rests as a common and equal burden upon the sureties, do not the same considerations appeal with equal force to the CHANCELLOR, that he may see to it, that one of them shall not, by secret or fraudulent contrivances and conveyances of property, fasten the whole of it upon the other? We think that the principle may well have this extended application."

No. 6. — *CRAYTHORNE v. SWINBURNE*.

(1807.)

RULE.

WHERE a surety has engaged with the principal to be liable only on default of another surety, the latter cannot, when obliged to pay the debt, call upon the former for contribution.

Craythorne v. Swinburne.

14 Vesey, 160-171 (9 R. R. 264).

Surety. Contribution. Right excluded by Express Contract.

[160 No contribution in favour of one surety against another: his engagement, according to the bond, and parol evidence, which was held admissible, being, not as co-surety, but, without the privity of the other, as a distinct collateral security, limited to default of payment by the principal and the other surety.]

No. 6. — Craythorne v. Swinburne, 14 Vesey, 160, 161.

Hamersley and Co., bankers, being creditors of Henry Swinburne, and calling in their money, an application was made by Sir John Swinburne, the nephew of Henry Swinburne, to the Newcastle Bank, who advanced the money upon the security of two bonds: one the joint and several bond of Henry Swinburne as principal, and Craythorne as surety, for £1200: the other by Sir John Swinburne, reciting the former bond, and the advance of the money to Henry Swinburne and Craythorne, at the request of Sir John Swinburne, with condition to be void on payment by Henry Swinburne and Craythorne, or either of them. The £1200 advanced was applied accordingly in discharge of the debt to Hamersley and Co. Afterwards Henry Swinburne died abroad insolvent; and Craythorne, having paid the whole sum, filed the bill, praying contribution by Sir John Swinburne, who insisted, that he was not a co-surety with the plaintiff, but merely a collateral security to the bank in default of payment by

* Henry Swinburne and Craythorne, and offering evidence [* 161] of his conversation with one of the partners in the bank, stating their objection to the security of Henry Swinburne and Craythorne, and requiring, as the condition of the advance, a bond from Sir John Swinburne to pay the money, in case they should not pay it.

Sir Samuel Romilly and Mr. Wear, for the plaintiff:—

This is a plain case for compelling contribution by this defendant, as a co-surety with the plaintiff. The Court looks to the real transaction: therefore, whether they are sureties by one or by several instruments, is immaterial: the liability depending upon, not the form, but the essence, of the contract. In the case of *Dering v. The Earl of Winchelsea*, 2 Bos. & P. 270, three joint and several bonds were given by Thomas Dering and each surety separately, that Thomas Dering should duly account to the Crown; and it was held, that the circumstance, that the bonds were distinct, could not make a difference. The evidence in this cause proves, that the whole of this sum of £1200 was advanced to Henry Swinburne: and the plaintiff had no part of it, being merely a co-surety, as well as Sir John Swinburne, whose bond recites, that the advance of the bank for his uncle's benefit was at the special instance and request of Sir John Swinburne.

Mr. Richards and Mr. Bell, for the defendants, relied upon the circumstances, as distinguishing this case from that in the Court

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of Exchequer, observing, that previously to that decision the point was a subject of much doubt; and upon that authority it would not have been prudent to abstain from parol evidence.

[* 162] * Sir Samuel Romilly, in reply: —

That case stands upon a firm foundation. The whole doctrine of principal and surety, with all its consequences, of contribution, &c., rests upon the established principles of a Court of equity; not upon contract, except as it may be so represented upon the implied knowledge of those principles. There is no express contract for contribution: the bonds generally, if not universally, being joint and several, creating several obligations by each. The contribution results from the maxim, that equality is equity: proceeding where the instruments are several, very much upon this, that a surety will be entitled to every remedy which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor; not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him: though there was no stipulation for that; and to avail himself of all those securities against the debtor. This right of a surety also stands, not upon contract, but upon a principle of natural justice: the same principle upon which one surety is entitled to contribution from another. The creditor may resort to either for the whole, or to each for his proportion; and, as he has that right, if he from partiality to one surety will not enforce it, the Court gives the same right to the other surety, and enables him to enforce it. Natural justice requires, that the surety, having become security with others, shall not have the whole thrown upon him by the choice of the creditor not to resort to remedies in his power; the effect of which would be an equal contribution. That being

the principle, for enforcing contribution, established by [* 163] authority in the case of * *Dering v. The Earl of Winchelsea*, there can be no difference, whether they become sureties by one or by different instruments: or whether a surety knew at the time, that he was co-surety with others: distinctions which must determine the extent of liability, if it arose from contract.

The question then is, whether this case contains another distinction; that this defendant's engagement was to be surety for

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the plaintiff, the other surety, not for the principal debt; that the defendant was a surety only in default of payment by the plaintiff: whether that appears upon the face of the instrument, or can be established by evidence: and whether parol evidence can be received. There was certainly an omission in not making this bond void upon the payment of the debt. It would still be absolute at law, though the money might have been paid by Sir John Swinburne: but there can be no doubt that is an omission; and the intention was, that the bond should be void by the payment at any day by him as well as by the other two. Though the bonds treat them all as principals, the fact is admitted, that Henry Swinburne was the only principal, and the other two were sureties; and then upon established principles one surety has a right to call upon the other to contribute equally with himself; or to compel the creditor, the instant the day was past, and the bonds were absolute, to enforce both bonds against both, not one only. The evidence, produced to prove that this defendant was a surety only in default of payment by the plaintiff, cannot be received. It consists only of declarations, to which the plaintiff was no party, and made in his absence. Upon the whole this case has no distinction from the common case of co-sureties.

July 17th. The LORD CHANCELLOR (Lord ELDON): — [* 164]

Before the final decision of this case I wish to have the Register's Book examined, to see what was done in a case that occurred in Trinity Term, 1706, *Cooke v. ———*, 2 Freem. 97.

Upon the relation of principal and surety some things are very clear. It has been long settled, that, if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this Court, either upon a principle of equity, or upon contract, to call upon his co-surety for contribution: and I think that right is properly enough stated as depending rather upon a principle of equity than upon contract; unless in this sense, that the principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of that principle by all persons, and it must be upon such a ground of implied assumpsit, that in modern times Courts of law have assumed a jurisdiction upon this subject: a jurisdiction convenient enough in a case simple and uncomplicated, but attended with great difficulty

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where the sureties are numerous; especially since it has been held (*Cowell v. Edward*, 2 Bos. & P. 268) that separate actions may be brought against the different sureties for their respective quotas and proportions. It is easy to foresee the multiplicity of suits to which that leads.

[* 165] * But, whether this depends upon a principle of equity, or is founded in contract, it is clear a person may by contract take himself out of the reach of the principle, or the implied contract. In the case of *Dering v. The Earl of Winchelsea*, which, I recollect, was argued with great perseverance, persons, not united in the same instrument, were made to contribute; and it was decided that there is no distinction, whether they are bound in the same obligation, or by several instruments. That case also established that though one person becomes a surety without the knowledge of another surety, that circumstance introduces no distinction. If the relation of surety for the debtor is formed, and the fact is not that the party becomes surety for both the principal debtor and another surety, not for the principal alone, it is decided that, whether they are bound by several instruments or not, whether the fact is or is not known, whether the number is more or less, the principle of equity operates in both cases; upon the maxim that equality is equity: the creditor, who can call upon all, shall not be at liberty to fix one with payment of the whole debt; and upon the principle requiring him to do justice, if he will not, the Court will do it for him.

When once it is admitted, as it was in that case, that a man may by contract place himself out of the reach of the principle, you must in every case consider whether the party has done so. It was admitted in that case that, one bond being for £10,000, and the surety having paid it, Lord Winchelsea, having executed a bond for £4000 only, though he was a surety, yet he had by contract taken himself out of the reach of the £6000, and was liable only to the extent of £4000. It must then be admitted that, if one surety can provide that another shall have no demand [* 166] against him for * a moiety of the debt, he may also contract that the other shall have no demand whatsoever against him.

The question then is, whether the meaning of this instrument, executed by the defendant, is, that he will be a co-surety; or that the surety in the former instrument was with reference to him to

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be considered a principal. If the real nature of the transaction is to be understood thus, that Henry Swinburne and the plaintiff entered into a bond for £1200 to the Newcastle Bank, Swinburne as principal, and the plaintiff as surety, and Sir John Swinburne, who had no communication, as it appears, with them, proposed to the bank that he should become a co-surety, there is an end of the question: but if not constituting himself co-surety with the plaintiff, he proposed to the bank only, that he would engage to pay them, if they could not get payment from either of the others, then he has by contract withdrawn himself from the reach of the principle; and the plaintiff cannot complain, as the transaction was without his knowledge, that the defendant bound himself only to the extent he thought proper.

With an opinion upon this point I do not however choose to decide it without an inquiry as to that case in *Freeman*, which, if it was decided, is a strong case; as there could be no doubt, whether the second security was to be considered a collateral security, and therefore there could be no question, whether the party meant to be a co-surety, or only to give, as is contended, in this instance, a collateral security.

July 23rd. The LORD CHANCELLOR:—

[* 167]

Before I delivered the opinion I had formed upon this, I desired to have the Register's Book examined as to the case in *Freeman* (*Cooke v. ———*, 2 Freem. 97), which occurred to me, with the view of being enabled to determine, whether it was the opinion of the MASTER OF THE ROLLS of that day, or had the authority of a judgment, when such a question as this was before him. I cannot find that any such judgment appears in the Register's Book. I must therefore take it to be only a declaration of the opinion of the MASTER OF THE ROLLS upon the point: a declaration, undoubtedly of great weight, and deserving great attention. It is therefore my duty upon a case in its circumstances perfectly new, to deliver my own opinion.

I take the case to be this, that Henry Swinburne was the only original debtor to Hamersley and Co., who called for their money; and it therefore became necessary for him to raise the money elsewhere. Sir John Swinburne appears to have applied to the bank at Newcastle: and according to the proposal made to those bankers, the sum of £1200 was to be raised upon the credit of

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Henry Swinburne and the plaintiff, to be applied to discharge the debt to Hamersley and Co. In that transaction, so proposed, Henry Swinburne was to be the principal, and the plaintiff the surety. The Newcastle Bank upon a discussion that took place between them and Sir John Swinburne intimated their dislike to deal upon the security of Henry Swinburne, and that they were not satisfied to

deal upon the security of both him and Craythorne. One [* 168] bond was executed * and tendered to the bank, in which

Henry Swinburne, as principal, and Craythorne, as surety, are jointly and severally bound for the sum of £1200. Another bond was executed in consequence of some conversation between the bank, by one of the partners, and Sir John Swinburne, which I think is admissible evidence. The cause may be decided without reference to that question; but, as it has an effect upon my mind, it is proper that the parties should know that. The substance of that communication is, that the house did not like to trust to the security of Henry Swinburne and Craythorne; but if Sir John Swinburne had a good opinion of the credit that might be given, if not to Henry Swinburne, to Craythorne, and would become security to the bank that he would pay, if they did not, by entering into a bond to pay the debt, if they did not pay it, the bank would advance the money.

The sum of £1200 was advanced accordingly: the bond, executed by Sir John Swinburne, reciting the former bond for money advanced to Henry Swinburne and Craythorne; and the condition is, that it shall be void if Henry Swinburne and Craythorne, or either of them, pay the money; and the banker says, he understood it to be a collateral security, by which he means a supplemental security.

The question is, first, whether Sir John Swinburne is under this instrument to be considered as a co-surety with Craythorne; or, whether the effect is, that Sir John Swinburne did not undertake to stand as a co-surety with Craythorne, but was surety for both, to pay only if both should make default. It must be considered

as entirely clear of any objection, that Craythorne could [* 169] take, that Sir John Swinburne was not at * liberty to deal

thus; as the proposition to the bank was, that Henry Swinburne and Craythorne were to be their debtors; and Sir John Swinburne, voluntarily adding his security, cannot be bound beyond the extent to which he thought proper to bind himself.

No. 6. — Craythorne v. Swinburne, 14 Vesey, 169, 170.

It was contended for the first time in *Dering v. The Earl of Winchelsea*, 2 Bos. & P. 270, that there is no difference whether the parties are bound in the same, or by different instruments, provided they are co-sureties in this sense for the debt of the principal; and farther, that there is no difference, if they are bound in different sums, except that contribution could not be required beyond the sums for which they had become bound. I argued that case, and was much dissatisfied with the whole proceeding, and with the judgment; but I have been since convinced that the decision was upon right principles. Lord Chief Justice EYRE in that case decided, that this obligation of co-sureties is not founded in contract, but stands upon a principle of equity; and Sir Samuel Romilly has very ably put, what is consistent with every idea, that after that principle of equity has been universally acknowledged, then persons, acting under circumstances to which it applies, may properly be said to act under the head of contract, implied from the universality of that principle. Upon that ground stands the jurisdiction assumed by Courts of law: a jurisdiction attended with great difficulty where there are many sureties, though not in the simple case where there are only two, one of whom may bring his action for a moiety upon the implied undertaking. But, whether this stands upon contract, or a principle of equity, it is clear that a party may take care by his engagement that he shall be bound only * to a certain [* 170] extent. That is proved by the case of *Swain v. Wall*, 1 Rep. Ch. 80, where the engagement being to pay in thirds, that contract was held to take them out of the principle that would have required a moiety; and also by *Dering v. The Earl of Winchelsea*, where it was admitted that Lord Winchelsea, though liable as a surety, had by contract withdrawn himself from any liability by virtue of which he should be charged beyond £4000.

If therefore by his contract a party may exempt himself from the liability, or that extent of liability in which without a special engagement he would be involved, it seems to follow that he may by special engagement contract so as not to be liable in any degree. That leads to the true ground, the intention of the party to be bound, whether as a co-surety, or only if the other does not pay: that is, as surety for the surety, not as co-surety with him. As to the bond itself, it is clear upon the face of this bond, and according to its language, that the bank and Sir John Swinburne, if at

No. 6. — *Craythorne v. Swinburne*, 14 Vesey, 170, 171. — Notes.

liberty to do so, did consider that this sum of money was to be an advance, as between Sir John Swinburne and the bank, to the other two. They have no right to complain of it, for there is no contract by Sir John Swinburne with the other two: he might limit his engagement with reference to them, as he thought proper; and the bond upon the face of it makes him surety only for the principal and the other surety. But it is clear upon the parol evidence; and why is not that competent evidence? Evidence is admitted to show who is the principal, and who the surety; and, in order to determine that, to show to whom the money was advanced; and why is it not to be admitted [* 171] to *show to whom the money was advanced as between

Sir John Swinburne and the others. But this goes farther; for the evidence is not in contradiction to, but in support of, the instrument; and, whether the demand is founded upon the equity only, or upon the implied contract, why should not evidence be admitted to show that the equity ought not to be applied, and the contract ought not to be inferred?

I do not state that the circumstance that Sir John Swinburne entered into this security without the knowledge of Craythorne, would have repelled the doctrine of contribution; as that stands upon this, that all sureties are equally liable to the creditor; and it does not rest with him to determine upon whom the burden shall be thrown exclusively: that equality is equity; and, if he will not make them contribute equally, this Court will finally by arrangement secure that object. But then the question comes round, whether that is according to the contract or engagement of the surety. My opinion is wrong, if Sir John Swinburne is a co-surety. Having considered this much, and given great attention to the case in *Freeman*, I think he is not a co-surety; but, as between him and Craythorne, the latter is just as much a principal as Henry Swinburne. The consequence is, that the equity does not apply, Sir John Swinburne being liable only in case the other two do not pay, and not being liable with them.

This bill therefore must be dismissed, but without costs.

ENGLISH NOTES.

This judgment of Lord ELDON was fully cited, and followed by Lord BLACKBURN in *Duncan, Fox, & Co. v. North and South Wales Bank*, No. 45 of "Bill of Exchange," 4 R. C. 591, at p. 607. The effect of

No. 7. — Bank of Ireland and others v. Beresford and others. — Rule.

Lord ELDON's judgment should be considered in connection with the cases set out and cited under the two previous rules, pp. 617 *et seq.*, 632 *et seq.*, *supra*.

AMERICAN NOTES.

In *Hunt v. Chambliss*, 7 Smedes & Marshall (Miss.), 532, B. made a note, with H. and others as sureties, payable to a bank. At maturity he wished to renew it. The bank requiring additional security, B. requested C. to go on the note to be given in renewal, upon which he had already obtained the signatures of the parties who were on the first note. C. signed the note as requested. H., having paid it at maturity, filed a bill against C. for contribution. The Court, citing the principal case, held that parol evidence was admissible to prove the nature of the engagement actually undertaken by C., and, such evidence showing that he was not a co-surety with H. and the others for B., but a surety for B. and his original sureties, he was not liable to H. for contribution.

Other American cases supporting the rule and its corollaries are *McDonald v. Magruder*, 3 Peters (U. S.), 470; *Monson v. Drakeley*, 40 Connecticut, 552; 16 American Reports, 74; *Hamilton v. Johnston*, 82 Illinois, 39; *Robertson v. Deatherage*, 82 Illinois, 511; *Bowser v. Rendell*, 31 Indiana, 128; *Baldwin v. Fleming*, 90 Indiana, 177; *Whitman v. Gaddie*, 7 B. Monroe (Ky.), 591; *Chapeze v. Young*, 87 Kentucky, 476; *Longley v. Griggs*, 10 Pickering (Mass.), 121; *Knox v. Vallandigham*, 13 Smedes & Marshall (Miss.), 526; *Cutler v. Emery*, 37 New Hampshire, 567; *La Grange v. Merrill*, 3 Barbour Chanc. (N. Y.) 625; *Dawson v. Pettway*, 4 Devereux & Battle Law (N. Car.), 396; *Turner v. Overall*, 39 Southwestern Rep. 756 (Tenn. 1897); *Keith v. Goodwin*, 31 Vermont, 268; 73 American Decisions, 345; *Adams v. Flanagan*, 36 Vermont, 400; *Harrison v. Lane*, 5 Leigh (Va.), 414; 27 American Decisions, 607; *Singer Mfg. Co. v. Bennett*, 28 West Virginia, 16. Further authorities are collected in 7 Am. & Eng. Encycl. of Law, 2nd ed. pp. 335 *et seq.*

No. 7. — BANK OF IRELAND v. BERESFORD.

(H. L. 1818.)

No. 8. — ROUSE v. BRADFORD BANKING COMPANY.

(H. L. 1894.)

RULE.

A TRANSACTION between the creditor and the principal debtor, whereby the rights of the surety are altered without his consent, — such as a binding agreement to give time without expressly reserving the creditor's right against the

No. 7. — **Bank of Ireland and others v. Beresford and others, 6 Dow, 233. 234.**

surety, — discharges the surety. And the rule applies in every case where at the time of the transaction the creditor has notice that the relation between the debtors is one of principal and surety, although at the time of the constitution of the debt they may both have been interested in the consideration.

Bank of Ireland and others v. Beresford and others.

6 Dow, 233-239 (19 R. R. 50).

Surety. — Bill of Exchange. — Discharge by giving Time to Principal.

[233] Commissioners under an Act of Parliament, for giving money by way of loan to merchants, &c., make an advance for A., who, along with B. as his surety, becomes bound to repay within a limited time. A. obtains from the commissioners several extensions of the time of payment without the privity or knowledge of B., his surety, and at length becomes bankrupt without having paid. Bill to restrain proceedings at law against the surety, the obligation being discharged upon the indulgence granted without his privity or knowledge. Decreed accordingly and the decree affirmed in Dom. Proc.

[* 234] * By an Act of the Irish Parliament of 33 Geo. III commissioners were named, who were empowered to advance certain sums to merchants, traders, and manufacturers, upon securities, the sums to be advanced by the Bank of Ireland, and to be made good by Parliament. Thomas Blair, an iron manufacturer in Dublin, applied, about the 30th January, 1800, to the commissioners for a loan, offering John Claudius Beresford, Archibald Redford, and Richard Sayers, all of Dublin, as his co-securities. It was determined to advance to Blair a sum of £10,000; and a bill of exchange, a security not authorised by the Act, dated 7th February, 1800, to that amount was drawn by Blair on Beresford, and accepted by him to the order of Redford, and indorsed by him and Sayers, payable on the 1st of November following. A bond, with warrant of attorney, was also executed by Blair and his sureties.

Blair afterwards obtained several extensions of time, for the payment of the above sum, and at length became bankrupt, without having paid. Judgments had been entered upon the bond and warrant of attorney, and the governor and company of the bank were about to levy the £10,000 from the sureties, when they filed their bill in the Exchequer Court, against the governor and

No. 7. — Bank of Ireland and others v. Beresford and others, 6 Dow, 234-236.

company of the bank, the secretary to the commissioners (in whose name the commissioners were under the Act to sue and be sued) and the Attorney-General, stating that the extensions of credit were given without their privity and concurrence, and that they, being *merely sureties, were by such in- [*235] dulgence discharged; and praying for a perpetual injunction to restrain proceedings at law against them on the ground of this obligation. The defendants answered that the sureties had notice of the indulgence, and that, even if they had not, the extensions were not of a nature to discharge them. An issue was directed to try whether the plaintiffs had notice, but the defendants declined the trial, not being able to prove notice.

The Court of Exchequer, in 1814, decreed according to the prayer of the bill. And from this decree the defendants appealed.

At the hearing in the House of Lords, in March, 1818, the cases of *Walwyn v. St. Quintin*, 1 Bos. & P. 652; *Nesbitt v. Smith*, 2 Bro. C. C. 179; *Rees v. Berrington*, 2 Ves. 540 (3 R. R. 3); and *Boulbee v. Stubbs*, 18 Ves. 20 (11 R. R. 141), were cited; and the case of *Finlam v. Pocock*, 5 Taunt. 192, decided on the principle that, neither time given by the holder to the drawer to pay, nor knowledge of the holder when he took the bill that the acceptance was merely for the accommodation of the drawer, discharged the acceptor, and that nothing could discharge him but payment or a release, was particularly relied on by the Solicitor General on behalf of the appellants.

LORD ELDON (LORD CHANCELLOR):—

The proceedings in this case are proceedings on a bond and warrant of attorney to confess judgment, executed by Blair and the respondents, under the circumstances mentioned in the pleadings. But the bond and bill of exchange, *mentioned [*236] in the cases, are not produced in this House, nor copies of them; and yet it is absolutely necessary that we should have them or copies of them; 1st, because it is always dangerous to decide without seeing the instruments on which the cases depend; and 2ndly, because there is hardly any case from Ireland in which it is not necessary to call for this supplemental information.

The case is the more remarkable here, and it is the more necessary that we should see these instruments, as there appears no authority in the Act of Parliament for taking a bill of exchange;

No. 7. **Bank of Ireland and others v. Beresford and others, 6 Dow, 236, 237.**

and when it is made a question, and the subject of argument, whether the bill of exchange was not the principal security, and the bond the collateral security, it becomes still the more reasonable and proper that we should see them; for though the bond is a security of a higher nature, yet if in its recital it refers to the bill of exchange as the principal security, although the one is a specialty, and the other only a simple contract, the specialty may, perhaps, be only the collateral security.

And then you will have to consider the effect of the commissioners taking a bill of exchange as a security when the Act says that they shall take only securities under seal; and it cannot without a great deal of reservation be argued with success that they shall have the benefit of such a security under the Act, when the Act authorises none such to be taken.

Then in this bill of exchange J. C. Beresford is the acceptor, and if the bond is a collateral security, then you will have to consider what is the effect of the circumstance that, though [* 237] Beresford is *the acceptor, still the consideration was given to Blair, and that with the knowledge of the commissioners. First, then, it will be to be considered in what situation Blair and Beresford stand with respect to the commissioners, and each other; and secondly, in what situation those who have indorsed this bill stand to justify this decree.

The Solicitor General says, that the Court of Common Pleas have determined (*Fentum v. Porock*, 5 Taunt. 192) that although one receives a bill of exchange with the knowledge that it is an accommodation bill, &c., yet the acceptor is bound to pay, and this decision took place when Sir JAMES MANSFIELD was CHIEF JUSTICE, and the present CHIEF JUSTICE (Sir VICARY GIBBS) was one of the puisne Judges. If that went on this principle, that with a view to the benefit of commercial intercourse you would not inquire into the knowledge of parties; but that all should be taken according to the natural effect of the bill, as appearing on the face of it, I think that a most wholesome principle. And it will not be surprising that I, who have so often contended that you ought always to look only at the natural effect of a bill of exchange, and never to hold that the acceptor was not first liable, should approve of that principle. And yet we have been so often misled in Chancery as to what had been considered as the law on that point by the Court of King's Bench as to have held, perhaps a dozen times, that the

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consequence was contrary to what has been determined by the Court of Common Pleas, supposing the principle to be that which I have mentioned.

Then it is also necessary that we should see this bond, not only to be certain as to the obligations of * the parties [* 238] with reference to the law, as between principal and surety generally, but as arising out of this Irish Act of Parliament. In the common case there can be no doubt with respect to a bill of exchange, but that the demand ought first to be made against the acceptor, and he not paying, and notice being given to the drawer, he then became liable. And with respect to principal and surety in a bond where the creditor enters into an agreement or binding contract with the principal debtor, to give him further time without the concurrence of the surety, the surety is discharged; as the creditor by his new contract destroys the benefit which the surety had under the former contract, as he puts it out of his own power to make good his engagement to enforce immediate payment from the principal, when the surety would have a right to require him to do so. But special circumstances may vary even that, as in the case in 18 Ves. (*Boulthée v. Stubbs*, 18 Ves. 20) which I ought not to rely upon as authority, being a decision of my own, but which was sanctioned by a decision of Lord THURLOW. It was said there, that unless the alteration of the time and mode of payment extended to the surety, so as to prevent his enforcing immediate payment, the contract could mean nothing. But the parties must be allowed to judge of that; and there may be many cases in which individuals may think, that having obtained delay as against the creditor, they may leave the matter open as to the surety, trusting to his feelings that he will not distress them.

This case is to be viewed with reference to all these principles. It is also to be considered with * reference to [* 239] this Act of Parliament. If the Act gives the Crown process to the surety in the event of their being called upon to pay, and if they were not placed in that respect in a worse situation, that is one view of the case; but if there are clauses in the Act requiring the commissioners to sue without delay: and the commissioners being so required to sue without delay, have put that out of their own power, then it will be to be considered whether all are to be taken as being parties to this Act of Parliament; and whether the commissioners, being under an obligation by the Act

No. 8. — *Rouse v. Bradford Banking Co.*, 63 L. J. Ch. 890, 891.

to sue without delay, could take the benefit even of passiveness as against the surety.

But I give no final opinion upon these points till we have authentic copies of these instruments, that we may take care to be accurately informed of the nature of the instruments to which we are called upon to give legal effect. *Decree afterwards affirmed.*

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63 L. J. Ch. 890-896 (s. c. 1894 A. C. 586; 71 L. T. 522; 43 W. R. 78).

[890 *Banking Account. — Overdraft. — Giving of Time to Debtor. — Principal and Surety. — Release of Surety.*

The appellant, a retired partner, was liable as surety to the respondents for an overdraft in favour of the continuing members of the firm. The amount of overdraft and its time-limit were twice extended by the respondents. On these occasions minutes were entered in the bank's books simply specifying the amounts and dates of the increased overdrafts: The House (affirming the judgment, but without adopting the reasons of the Court of Appeal), *held* that the appellant was not discharged from his liability as surety, inasmuch as the rights of the respondents with respect to the original overdraft had been in no respect modified by the subsequent arrangements between the respondents and the continuing members of the firm.

By the LORD CHANCELLOR (LORD HERSCHELL). — It may be that an overdraft does not prevent the bank, who have agreed to give it, from at any time giving notice that it is no longer to continue. But if the bankers have agreed to give an overdraft, they cannot refuse to honour cheques or drafts, within the limit of that overdraft, which have been drawn and put in circulation before any notice to the person to whom they have agreed to give the overdraft that the limit is to be withdrawn.

Appeal from the Court of Appeal. The facts sufficiently appear in the LORD CHANCELLOR's judgment.

After arguments, in which *Oakeley v. Posheller* (H. L.), 10 Bligh (N. S.), 548, 4 Cl. & F. 207 (and in the Court below, [891] 1 L. J. Ch. 204); *Oakford v. The European and American Steam Shipping Company*, 1 Hem. & M. 182; *Maringay v. Lewis*, Ir. Rep. 3 C. L. 425, 5 C. L. 229; *The Oriental Financial Corporation v. Overend & Co.*, L. R. 7 Ch. 142 (and more fully, 41 L. J. Ch. 332, L. R. 7 H. L. 348); *Wilson v. Lloyd*, 42 L. J. Ch. 559, L. R. 16 Eq. 60; *Swire v. Redman*, 1 Q. B. D. 536; *Bailey v. Edwards*, 4 B. & S. 761, 772, 34 L. J. Q. B. 41; *Baynton v. Morgan*, 58 L. J. Q. B. 139, 22 Q. B. D. 74; and *Moule v. Garrett*, 41 L. J. Ex. 62, L. R. 5 Ex. 132, 7 Ex. 101, were referred to: —

No. 8. — *Rouse v. Bradford Banking Co.*, 63 L. J. Ch. 891, 892.

THE LORD CHANCELLOR (LORD HERSCHELL). — The appellant, who was the plaintiff in the action, was formerly in partnership with certain other persons carrying on business as worsted spinners under the firm of William Rouse & Co. The partnership between them was dissolved by a deed of the 17th of April, 1885. By that deed William Rouse was to cease to carry on the business, and the other members of the firm, John Frederick Rouse, Frank Rouse, and Herbert Rouse, were to continue to do so. By that deed the debts of the firm were to be paid by the new partnership, who were to take over its assets; and they covenanted with William Rouse, the retiring partner, to indemnify him against those debts. That covenant contained a proviso to which I will call attention presently.

At the time of the dissolution, amongst the debts owing was a debt of upwards of £50,000 to the Bradford Banking Company. At the time when the new firm failed, some years afterwards, the debt had been reduced below £50,000, but a considerable amount was still owing to the bank, and this action was brought to recover it, or rather to enforce their right to hold certain shares belonging to William Rouse as security for it. The answer to the action was that William Rouse had been discharged from all his liability to the bank by reason of transactions between the bank and the new firm. The case was put in this way: that upon the dissolution of the firm under the deed which I have mentioned as between themselves, the continuing partners became the principal debtors, and William Rouse *merely a surety for them; and that [*892] inasmuch as the bank had notice of the deed of dissolution and its terms, it was brought to the knowledge of the bank that such was the relation of the parties after that date. Then it was said that the bank, thus knowing that William Rouse had become surety only as between him and his former co-partners, gave time to the continuing members of the firm for the payment of the debt in question, and so discharged William Rouse. It was contended indeed, alternatively, that there had been a novation, and that the bank had accepted the new firm as their debtors in place of the co-debtors who had previously been liable to them, and that, by this novation, William Rouse was discharged. That argument has not found favour with any of the learned Judges before whom the case has come, and your Lordships have already intimated that, in your opinion, it cannot be supported.

With regard to the question whether time was given so as to discharge the surety, the general principle of equity — that where there is a contract with two persons, one as principal and the other as surety, and time is given to the principal without the assent of the surety, and without the rights of the surety being reserved, the right against the surety has gone — was not contested; but it was said to be inapplicable to such a case as the present, where those who as between themselves became principal and surety had been originally both of them principal debtors to the creditor.

On the other hand, it was contended that this made no difference, and that the rule of equity was as applicable to a case where two having both been principal debtors, one afterwards became, with notice to the creditor, a surety, as it was to a case where the contract between him and the creditor was one of principal debtor and surety. Reliance was placed for this proposition upon the case of *Oakeley v. Pasheller* (H. L.), 10 Bligh (N. S.), 548, 4 Cl. & F. 207 (and in the Court below, 1 L. J. Ch. 204), decided in this House. That case has been very much discussed; and inasmuch as I believe all your Lordships have formed a clear opinion upon the argument which has been addressed to you on that point, it is probably well to express it, although the decision in this House does not turn upon the conclusion arrived at with regard to *Oakeley v. Pasheller*.

In *Oakeley v. Pasheller*, Lord LYNDBURST, in delivering judgment, said this: "Now in consequence of an arrangement which took place between the representatives" (that is, the representatives of the retiring partner) "and the new partnership" (in that case an additional partner was taken in when one of the partners went out), "they stood in the character of sureties: and the principle of law is this, — that where a creditor gives time to the principal, there being a surety, without any communication with the surety, and without the consent of the surety, it discharges him from liability, because it places him in a new position and exposes him to risks or contingencies which he would not otherwise be liable to." The proposition is there laid down in terms quite unequivocal by Lord LYNDBURST, affirming Lord BROUGHAM as Lord CHANCELLOR, and the MASTER OF THE ROLLS.

It has been suggested, in a case to which I will call attention in a moment, that that case turned upon the fact that the creditor had been a party to an arrangement by which the representatives

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of the deceased and retiring partner were, as between him and them, to be sureties only. I cannot myself find any trace of such an arrangement as being the foundation, in any respect, of the judgment of Lord LYNDHURST.

In the case of *The Oriental Financial Corporation v. Ocerend, Gurney, & Co.* (L. R. 7 Ch. 142, and much more fully, 41 L. J. Ch. 332, L. R. 7 H. L. 348), before Lord HATHERLEY when Lord CHANCELLOR, he referred somewhat elaborately to the facts in *Oakeley v. Pasheller*, and said: "There is really in substance no hardship; and that is one reason why I dwelt at some little length to show that it was not a doctrine which was at all shaken by the right of the creditor to preserve his remedies against the surety; and if there was any small hardship they could have freed themselves from that hardship and all difficulty whatever. A person comes and tells them that since the debt was contracted circumstances have arisen by which he is in fact surety and the other debtor is the principal debtor. Thereupon all that they have to do is to *give the principal debtor time and reserve their rights [* 893] against the surety." It is quite clear, from the language used in the earlier part of the judgment, that Lord HATHERLEY considered he was really following the principle laid down in *Oakeley v. Pasheller*. The case of *The Oriental Financial Corporation v. Ocerend, Gurney, & Co.* was this: That two persons had appeared to the creditor, at the time the contract was entered into, to be both principal debtors, and he afterwards obtained notice of the fact that one of them was a surety only. It was held that when once he had received that notice he could not give time to the one who, as between themselves, was the principal debtor, without discharging the surety.

That case came before this House on appeal from the decision of Lord HATHERLEY as CHANCELLOR, and the judgment was affirmed. Lord CAIRNS said: "It appears to me that after the case which was referred to at the bar, decided by your Lordships' House, of *Oakeley v. Pasheller*, it is impossible to contend if, after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under those circumstances the rule as to the discharge of the surety does not apply." That is a distinct and clear expression of opinion as to the limits and the grounds of decision in *Oakeley v. Pasheller*, and it is in accordance with the

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view which I have myself formed of that case. And in this House, as I have said, the decision of Lord HATHERLEY was affirmed, and therefore the proposition was actually applied in a case where the two debtors had both been believed to be principal debtors by the creditor at the time the contract was entered into.

I own I am quite unable to see any distinction, even if *Oakeley v. Posheller* did not exist, between that case in the House of Lords and the present. If, notwithstanding that both the debtors appeared to be principal debtors, the knowledge afterwards that one of them is a surety only disentitles you to deal with the other in the way of giving time without discharging that debtor, then it seems to me it must equally be the case, for otherwise there would be a distinction resting on no intelligible or solid basis, that where, although both principal debtors at the time, one of them afterwards, as between himself and his co-debtor, becomes a surety, a dealing with the one who remains the principal debtor discharges the surety.

So far I have expressed the opinion that on the point of law relied on — namely, that if it can be shown that there was a giving of time to the new firm this would release the debtor, the appellant — I think the case is made out, unless the proviso to the covenant of indemnity in the deed of partnership alters the rights of the parties. The proviso is that William Rouse “shall not be entitled to require payment of any of the said debts or sums of money hereinbefore covenanted to be paid by the said John Frederick Rouse, Frank Rouse, and Herbert Rouse” (the continuing partners) “so long as the said William Rouse, his heirs, executors, and administrators, shall be indemnified according to the covenant last hereinbefore contained.” In the view taken by the learned Judges in the Court below, the fact that this proviso was added to the covenant of indemnity prevented the ordinary doctrine applying to which I have been referring, inasmuch as, in the opinion of those learned Judges, the fact of giving time would not have prejudiced any rights which William Rouse was possessed of, the proviso having by agreement between him and his co-partners limited those rights to an extent which would prevent his being prejudiced. That is certainly a question of some gravity. I do not intend, because in the view that I take it is unnecessary, to express a decided opinion upon it, but I own that I should entertain great doubts, and I should have to give further consideration

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to the question, before I could give any assent to the proposition which has been the foundation of the view of two of the learned Judges in the Court below.

I come now to the question which of course lies at the root of the defence, — whether it has been made out that the bank gave time to those who had become principal debtors. There are two transactions * relied on for the purpose of estab- [* 894] lishing this. It was upon one of these that the learned Judges in the Courts below pronounced judgment. It became unnecessary to consider the other, because they came to the conclusion that the first of these did amount to a transaction by which there was an agreement to give time. I cannot but think that some of the considerations which have been dwelt upon in your Lordships' House were not fully present to the minds of the learned Judges in the Court below in dealing with this part of the case. Very little is said upon this question. It is somewhat summarily dismissed as being clear and free from difficulty, and as being a case in which there was a binding agreement to give time.

Now we have no evidence as to what actually passed between the parties on the occasion when the suggested agreement was come to. It is of course obvious that time is only given within the meaning of the rule to which I have been referring if there is a binding agreement arrived at for good consideration. There was here no written agreement, and we are left to find out what the agreement was from a perusal of certain minutes of the bank with reference to the transaction: but of course those minutes can only be construed, and will only assist us to arrive at what the real bargain between the parties was, if we consider them in the light of the relation between the parties at the time when those minutes were made. We must look at their position before and after in order to understand the minutes and to arrive at any just conclusion as to what the parties intended to agree to, and did agree to.

Now the minute is in these terms: "Mr. John F. Rouse attended and submitted the balance-sheet of his firm up to the 31st of December last, and made application for an overdraft of £53,046 until the 14th of March." Before saying anything upon those words, I think it is essential to see what arrangement for overdraft had existed, if any, prior to that date. A minute is put in of the 31st of December, 1886, which is in these terms: "Resolved

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that the account of Mr. Rouse and Company may be for a short time in excess of the normal limit of £50,000 by £2000." That is the earliest of the minutes before us; but at the time of the dissolution there was an overdraft to an extent a little exceeding £50,000; that is to say, in the time of the old firm. I have no hesitation in drawing the inference under those circumstances that there had been an agreed overdraft with the old firm, which was continued afterwards, for a limit of £50,000, and that that agreed overdraft with that normal limit was in existence on the 16th of February, 1889, when this minute was made. What, then, is the meaning of "making application for an overdraft of £53,046 until the 14th of March"? It seems to me to be no more than this, — an application that the agreed overdraft of £50,000 which had existed for many years should for a limited period of time be increased to £53,000. But I do not think it was intended that the rights of the parties, whatever they were, as regards the £50,000 overdraft should be in any respect altered, or that the £53,000 overdraft, so long as it existed, should be an overdraft meaning anything else or on any other terms than those which had been applicable to the agreed overdraft of £50,000. Certainly I should be very much surprised if it was ever intended by the parties, that supposing (which is the assumption of the appellants, and which I will make for the purposes of this case) that prior to this agreement at any time a writ had been issued or a claim made for the £50,000, the right to claim or to sue for the £50,000 was to cease during this term until the 13th of March because there was for that time to be an increase of the overdraft. I think it is manifest from the subsequent minutes, that this £50,000 overdraft was regarded by both parties as continuing after the 14th of March. This is not a separate application for a single transaction of an overdraft of £53,000 for a certain time, because there was an overdraft before, and there was an overdraft afterwards. It is obvious, therefore, that all that this transaction had relation to was an increase of that overdraft which began before and was continued,

and was understood by both parties to be so. If that [* 895] *be the true view, it seems to me to be conclusive that

there was here no agreement to give time or to alter in any respect the relation between the parties; because, in my judgment, whatever could have been done in the way of enforcing any right to this £50,000 before the 16th of February, continued just

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as much within the power of the bank after the 16th of February and down to the 14th of March, and indeed thenceforward.

It is not necessary to consider what the rights of the bank were with regard to their debtors when they had agreed to an overdraft. The transaction is of course of the commonest. It may be that an overdraft does not prevent the bank who have agreed to give it from at any time giving notice that it is no longer to continue, and that they must be paid their money. This I think at least it does: if they have agreed to give an overdraft they cannot refuse to honour cheques or drafts, within the limit of that overdraft, which have been drawn and put in circulation before any notice to the person to whom they have agreed to give the overdraft that the limit is to be withdrawn. That effect I think it has in point of law; whether it has more than that in point of law it is unnecessary to consider. Even if it has no greater effect in point of law, it is obvious that neither party would have it in contemplation that when the bank had granted an overdraft it would immediately, without notice, proceed to sue for the money; and the truth is that, whether there were any legal obligation to abstain from so doing or not, it is obvious that, having regard to the course of business, if a bank which had agreed to give an overdraft were to act in such a fashion, the results to its business would be of the most serious nature. It may be, therefore, that the parties simply contracted upon the basis of that state of things, that there is a legal right throughout for the bank at any time to sue for the money. But whatever the right was, it seems to me that that right was in no way diminished, but continued in full force and effect notwithstanding the arrangement of the 16th of February. That of course is sufficient to dispose of that part of the case.

It was asked by Mr. Renshaw what was the meaning, then, if the bank might thus have sued, of saying that there was to be an overdraft until the 14th of March? It had the effect I have just described — precisely the same effect as the previous overdraft had — that, just as before they could not have refused to honour drafts, within the limit, drawn and put in circulation before they had given notice, so it appears to me that between that date and the 14th of March they could not refuse to honour drafts drawn within the greater limit, — namely up to £53,000, unless they had given notice that the overdraft would be withdrawn.

It is not necessary to say whether this agreement was entered

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into for valuable consideration or not. If it was not, of course it must wholly fail; but inasmuch as I think there was no agreement to give time in the sense required, it is not necessary to inquire whether the minutes disclose a contract for valuable consideration or not.

So much for the first transaction. The second transaction arose in this way. At that time the limit had been reduced from £50,000 to £45,000. That took place on the 9th of April, 1889, when there was a resolution: "That the limit of the account of William Rouse and Company for the future be £45,000." They had reached that limit, and were anxious that certain bills should be met. The bills amounted to the sum of £18,000, and they were maturing at various dates from the 13th of August till the 18th of November, 1890. The firm were very anxious that the bank should undertake to meet those bills. The bank were unwilling to do this without further security, inasmuch as it was beyond the £45,000 limit. Upon that an agreement was entered into by which two persons each became surety to the extent of £2500 to the bank, and in consideration of that the bank undertook that if Messrs. William Rouse & Co. paid into the bank before the 30th of September sums amounting to not less than £10,000, they would meet those bills. The security makes it clear that no part of it

was given for the £45,000; it was only for such excess as [* 896] there should be in the amount *due from the firm to the bank over £45,000. The last clause is in these terms: "It is hereby agreed and declared that this guarantee and the liability of the surety thereunder shall absolutely cease and determine when and so soon as the balance owing by the said principals to the said company shall, after the 18th of November next, be reduced to the sum of £45,000." No doubt it was in the contemplation of the parties that it would not be until the 18th of November that it would be reduced to the sum of £45,000. £45,000 was the limit; with that limit the bank were content; and this was an advance beyond that limit, and it was because they were advancing beyond that limit that they required this fresh security.

Now it seems to me that this entire agreement had relation only to this new advance, to this undertaking to meet those bills which were in excess of the limit, and that it was not intended by any of the parties to it that it should affect any of the rights

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which the bank possessed in relation to the sum within the limit, —namely, £45,000. No security was given for that; the bank got nothing in respect of it; and it would be strange indeed if the bank, getting nothing in respect of it because they entered upon greater liabilities, which greater liabilities alone were secured to them by any fresh security, it should be held that they gave up, or that they intended to give up, or that the debtor supposed that they gave up, any rights which they possessed in respect of the £45,000. For these reasons I think, on the construction of that document, the true conclusion as to the intention of the parties is, that upon that occasion also there was no binding agreement to give time as to this £45,000, which alone could establish the defence that the appellant sets up.

For these reasons I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON. — When two or more persons bound as full debtors arrange, either at the time when the debt was contracted, or subsequently, that, *inter se*, one of them shall only be liable as a surety, the creditor, after he has notice of the arrangement, must do nothing to prejudice the interests of the surety in any question with his co-debtors. That appears to me to be the law as settled by the judgments of this House in *Oakeley v. Pusheller* (H. L.), 10 Bligh (N. S.), 548, 4 Cl. & F. 207 (and in the Court below, 1 L. J. Ch. 204), and *Overend, Gurney, & Co. v. The Oriental Financial Corporation* (L. R. 7 Ch. 142, and much more fully, 41 L. J. Ch. 332), L. R. 7 H. L. 348.

I am not prepared to affirm, upon the evidence before me, that the bank twice gave time to their debtors. In my opinion, all that they did on the first occasion was to substitute a wider for a narrower limit of overdraft during a specified period. But, save as to its amount, the overdraft was to remain in all respects the same as before. The terms upon which the balance due was recoverable underwent no alteration. On the second occasion there is still less ground for suggesting that time was given.

I think it right to state that, as at present advised, I am not prepared to assent to the view taken by two of the learned Judges of the Appeal Court with regard to the effect of the proviso. Seeing that it has become unnecessary to decide the point, I shall not waste time in discussing it.

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I therefore concur in the judgment which has been proposed by the LORD CHANCELLOR.

LORD ASHBOURNE. — I entirely concur in the opinions which have been expressed by my two noble and learned friends who have already spoken.

LORD MACNAGHTEN. — I concur.

LORD MORRIS. — I concur.

Order appealed from affirmed, and appeal dismissed with costs.

ENGLISH NOTES.

The principle that a surety is discharged by what is called 'giving time' is too well settled to require a lengthy citation of cases. The application of the rule to a bill of exchange has been already shown in the case of *Ocerend, Gurney, & Co. v. Oriental Financial Corporation* (appeal from *Oriental Financial Corporation v. Ocerend, Gurney, & Co.*), fully set forth as No. 44 of "Bill of Exchange," 4 R. C. 576 *et seq.*

The latter of the above principal cases shows that, to have this effect, the giving of time must be by an agreement binding on the creditor so as to debar him from suing the principal. And as the rule of equity is founded on the principle of preserving intact the rights of the surety, if the agreement for giving time is made under an express condition that the rights of the surety are reserved, the surety is not discharged: for his right of recourse remains intact. He can at any time pay the debt and stand in the position of the creditor discharged from the agreement; or may, by anticipation, obtain a judgment by anticipation according to the principle of *Wolmershausen v. Gullick* (12 R. C. 823). See, as to the effect of a condition that the rights of the surety are reserved: *Bateson v. Gosling* (1871), L. R. 7 C. P. 9, 11 L. J. C. P. 53, 25 L. T. 570, 20 W. R. 98; *Muir v. Crawford* (1875), L. R. 2 H. L. Sc. 456.

Where, however, the creditor actually releases the debtor, there cannot be any effectual reservation of remedies against the surety, though language importing an absolute release may, if such an intention appears, be construed as a covenant not to sue, leaving the debtor open to claims of relief against the sureties. See *Commercial Bank of Tasmania v. Jones* (P. C.), 1893, A. C. 313, 62 L. J. P. C. 104, 68 L. T. 776. And the express reservation of the rights of the surety may be a reason for adopting this latter construction. See *Webb v. Hewitt* (1857), 3 K. & J. 438. It is to be remembered that where persons are joined in a joint bond the absolute release of one is a release of all,

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independently of the special doctrine applicable to sureties. *Cheetham v. Ward* (1797), 1 Bos. & P. 630, 4 R. R. 741; *Re Wolmershausen* (1890), 62 L. T. 541. Compare *Blyth v. Fladgate*, 1890, 1 Ch. 337, 63 L. T. 533. And see note, 1 R. C. 172.

AMERICAN NOTES.

Large numbers of American decisions to the effect that the surety is discharged by a binding agreement by the creditor to give time to the principal debtor are collected in Brandt on Suretyship and Guaranty, 2nd ed. ch. xiv.; Baylies on Sureties and Guarantors, pp. 240-257; 21 Am. & Eng. Encycl. of Law, 1st ed. pp. 822 *et seq.*

Recent cases illustrating the scope of the principle are *United States v. American Bonding & Trust Co.*, 89 Federal Rep. (U. S. Circ. Ct.) 921; *Tuohy v. Woods*, 122 California, 665; *Bunn v. Commercial Bank of Cedartown*, 98 Georgia, 647; *Peterson v. Stge.*, 67 Illinois App. 147; *Williams v. Gooch*, 73 Illinois App. 557; *Voris v. Shotts*, 20 Indiana App. 220; *Olson v. Chism*, 21 Indiana App. 40; *Dohn v. Bronger*, 47 Southwestern Rep. 619 (Ky. 1898); *Burrus v. Davis*, 67 Missouri App. 210; *Olmstead v. Latimer*, 158 New York, 313; *Fraude v. Bishop*, 49 New York Supplement, 955; *Klein v. Long*, 50 New York Supplement, 419; *Niblack v. Champney*, 72 Northwestern Rep. 402 (S. Dak. 1897); *McKamy v. McNabb*, 97 Tennessee, 236; *Houston v. Braden*, 37 Southwestern Rep. 467 (Tex. 1896); *Merchants' Bank v. Russell*, 16 Washington, 546; *First National Bank v. Parsons*, 45 West Virginia, 688; *Hallock v. Yankey*, 78 Northwestern Rep. 156 (Wis. 1899).

In *Union Mutual Life Ins. Co. v. Hanford*, 143 United States, 187, Mr. Justice GRAY speaks of "the well settled and familiar rule that if a creditor, by positive contract with the principal debtor, and without the consent of the surety, extends the time of payment by the principal debtor, he thereby discharges the surety: because the creditor, by so giving time to the principal, puts it out of the power of the surety to consider whether he will have recourse to his remedy against the principal, and because the surety cannot have the same remedy against the principal as he would have had under the original contract: and it is for the surety alone to judge whether his position is altered for the worse. . . ."

And in Brandt on Suretyship and Guaranty, 2nd ed. sect. 312, it is said: "When the obligation of the surety is for the debt of the principal, if the time of payment is without the consent of the surety, by a binding agreement between the creditor and the principal, extended for a definite time, the surety is discharged. The reason is that the surety is bound only by the terms of his written contract, and if those are varied without his consent, it is no longer his contract, and he is not bound by it. It therefore follows that the fact that the principal is insolvent, or that the extension would be a benefit to the surety if he remained bound, makes no difference in the rule. Moreover, the surety has a right when the debt is due, according to the original contract, to pay it, and immediately proceed against the principal for indemnity, and he is deprived of this right by such an extension of the time of payment. As to this rule there is no conflict of authority among well-considered cases. The agreement

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to give time in order to have the effect of discharging the surety must be supported by a sufficient consideration. Otherwise the creditor is not bound by his agreement, and may at any time enforce the collection of the debt, and the surety may at any time pay the debt and proceed against the principal. And the rule is the same if the creditor actually forbears for the length of time which he has agreed without consideration to forbear. It is also well settled, as a general rule, that the mere passive delay of the creditor in proceeding against the principal, however long continued, and however injurious it may be to the surety, will not discharge the surety. In such case the contract is not changed, and the surety may at any time pay the debt and proceed against the principal."

If the creditor, when he gives time to the principal debtor, is unaware that the relation of principal and surety exists, the surety is not discharged. *Howell v. Lawrenceville Mfg. Co.*, 31 Georgia, 663; *Agnew v. Merritt*, 10 Minnesota, 308; *Nichols v. Parsons*, 6 New Hampshire, 30; *Kaighn v. Fuller*, 14 New Jersey Equity, 419; *Elwood v. Deifendorf*, 5 Barbour (N. Y.), 398; *Bonnell v. Prince*, 11 Texas Civil App. 399; *Parsons v. Harrold*, 32 South-eastern Rep. 1002 (W. Va. 1899). Thus in *Kaighn v. Fuller*, *supra*, it was held that, when one of two obligors in a bond claims relief against the holder of the bond on the ground that he is a surety for his co-obligor, and that the creditor has given time to the principal debtor without the consent of the surety, and there is nothing on the face of the bond to show the existence of the suretyship, the surety, to entitle himself to exemption from liability, must show that the fact of suretyship was communicated to the creditor.

It is enough if the creditor knows of the relation of principal and surety prior to the giving of time, though he did not know of it at the time of the original contract. *Scott v. Scruggs*, 60 Federal Rep. (U. S. Circ. Ct. of App.) 721; *Guild v. Butler*, 127 Massachusetts, 386, 389; *Wheat v. Kendall*, 6 New Hampshire, 504. The same rule applies, though the relation of principal and surety was not created until after the making of the original contract. *Smith v. Sheldon*, 35 Michigan, 42; *Colgrove v. Tallman*, 67 New York, 95.

If, as a part of the agreement by which time is given the principal debtor, the creditor expressly reserves his rights against the surety, the latter will not be discharged. *Jones v. Sarchett*, 61 Iowa, 520; *Salmon v. Clagett*, 3 Bland Chanc. (Md.) 125; *Clagett v. Salmon*, 5 Gill & Johnson (Md.), 314; *Sohier v. Loring*, 6 Cushing (Mass.), 537; *Hunt v. Knorr*, 31 Mississippi, 655; *Rucker v. Robinson*, 38 Missouri, 154; 90 American Decisions, 412; *Hagerty v. Hill*, 75 Pennsylvania State, 108; 15 American Reports, 583; *Viele v. Hoag*, 24 Vermont, 46; *Exchange Building & Investment Co. v. Bayless*, 91 Virginia, 134; *Boston Nat. Bank of Seattle v. Jose*, 10 Washington, 185; *Brandt on Suretyship and Guaranty*, 2nd ed. sect. 376. See also *Rockville Nat. Bank v. Holt*, 58 Connecticut, 526; *Morgan v. Smith*, 70 New York, 537; *Calvo v. Davies*, 73 New York, 211, 217; 29 American Reports, 130. In *Salmon v. Clagett*, *supra*, at p. 178. BLAND, C., said: "The giving of time to the principal debtor, with a reservation of the remedies, has, in many cases, the appearance of absurdity; because, when distinctly understood, it seems to be almost a flat contradiction in terms. Such a reservation of remedies in order to hold the surety bound must

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amount to this, that the creditor agrees to give time to the debtor; and yet, that they both agree, that the surety may, at any time, force the creditor to proceed against the principal by a bill *quia timet*, or by paying the whole debt, have an assignment of all the securities, and proceed immediately himself against the principal debtor: or in any other mode authorized by the assigned securities. Such an agreement, reserving the remedies, might not, in many cases, be of the least benefit to the principal debtor: since it leaves him entirely at the mercy of his surety: yet if the parties do so expressly contract, the surety can have no cause to complain, that the implied contract has been altered or impaired, in any way to his prejudice; and therefore he cannot be discharged."

If, after time has been given, the surety, with full knowledge of the facts, agrees to pay the debt, he will be bound without any new consideration. *Ellis v. Bibb*, 2 Stewart (Ala.), 63; *First Nat. Bank of Monmouth v. Whitman*, 66 Illinois, 331; *Williams v. Boyd*, 75 Indiana, 286; *Porter v. Hadenpugh*, 9 Michigan, 11; *Fowler v. Brooks*, 13 New Hampshire, 240; *Bramble v. Ward*, 40 Ohio State, 267; *Parsons v. Harrold*, 32 Southeastern Rep. 1002 (W. Va. 1899). But see, *contra*, *Warren v. Fant*, 79 Kentucky, 1; *Walters v. Swallow*, 6 Wharton (Penn.), 446.

If, however, the surety does not know that time has been given, when he makes a new promise, without consideration, to pay the debt, he is not bound thereby, but is discharged from liability. *Montgomery v. Hamilton*, 43 Indiana, 451; *Merrimack County Bank v. Brown*, 12 New Hampshire, 320; *Rochester Savings Bank v. Chick*, 64 New Hampshire, 410.

It is well settled that, not only the giving of time, but any material alteration of the terms of the contract, without the consent of the surety, will discharge the latter. "It is a general rule that any agreement between the creditor and principal which varies essentially the terms of the contract by which the surety is bound, without the consent of the surety, will release him from responsibility." Brandt on Suretyship and Guaranty, 2nd ed. sect. 378. Numerous American cases illustrating this principle are collected in Brandt, ch. xv.: Baylies on Sureties and Guarantors, pp. 260-273; 24 Am. & Eng. Encycl. of Law, 837-844.

No. 9. — COULTHART v. CLEMENTSON.

(1879.)

No. 10. — LLOYDS v. HARPER.

(C. A. 1880.)

RULE.

DEATH of the guarantor is not *ipso facto* a revocation of a continuing guarantee; but where the guarantor might

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have revoked it by notice, although only after a stated period, it is in effect revoked as to any credit which may be given after the creditor has received notice of the death and of the existence of a will.

But where the guarantee is of such a nature that the guarantor could not revoke it, as, for instance, if it is given for the performance of obligations incident to a *status* acquired on the faith of the guarantee, it is not revoked by death of the guarantor, or by consequential notice.

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5 Q. B. D. 42-48 (s. c. 49 L. J. Q. B. 204; 41 L. T. 798; 28 W. R. 355).

[42] *Principal and Surety. — Guarantee, continuing. — Notice of Death of Guarantor. — Revocation.*

A continuing guarantee, in the absence of express provision, is revoked as to subsequent advances by notice of the death of the guarantor.

Case reserved by BOWEN, J., at the Liverpool Summer Assizes, 1879, for further consideration.

The nature of the action, facts of the case, and the arguments, sufficiently appear from the judgment.

Dec. 4. Channell, for the plaintiff.

C. Russell, Q. C., and Crompton, for the defendants.

Cur. adv. vult.

[* 43] * Dec. 9. The following judgment was delivered: —

BOWEN, J. — This is an action brought by a bank upon a continuing guarantee against the executor of a deceased guarantor.

Messrs. E. & J. Clementson, cotton brokers and spinners in the county of Chester, had a banking account with the bank of which the plaintiff is the registered public officer. In the year 1867 the bank required security for the advances which were likely to be made to Messrs. E. & J. Clementson, and on the 24th of August, 1867, a written guarantee was executed by Nathaniel Lawton, the deceased, and the defendant Joseph M. Clementson, who is now Nathaniel Lawton's executor (and sued as such).

The material part of the guarantee is as follows: —

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"We, the undersigned, Joseph Moxon Clementson, of Dukinfield, in the county of Chester, cotton-spinner, and Nathaniel Lawton, of Micklehurst, flannel manufacturer, do hereby jointly and severally undertake and agree to guarantee to the proprietors of or partners in the said banking co-partnership for the time being the due and punctual payment when required of all such sums of money as may have been, or may be from time to time, advanced or paid by or from the said banking co-partnership, or which the same co-partnership may have already paid, or become liable to pay, or may hereafter pay or become liable to pay for or on account of the said Edward and John Clementson, or their order, on any account whatsoever, with interest, commission, and other banking charges upon such sums. . . . And we jointly and severally further agree as follows, namely, that this guarantee or engagement shall be considered a continuing guarantee, and shall not be withdrawn, but shall continue in full force until three months after notice to the manager of the said banking co-partnership in Ashton-under-Lyne in writing under our hands of our intention to discontinue or determine the same."

Advances were duly made by the bank under this guarantee down to the death of the testator, Nathaniel Lawton, on the 19th of December, 1875, at which date the firm of Messrs. E. & J. Clementson were considerably indebted to the bank. It was admitted, however, that sufficient sums of money after notice of the death had been paid into the account, and generally appropriated to the current account, to cover any balance which was in * fact owing at the date either of the death or of [*44] such notice. Upon the other hand, if the guarantee was not determined in law by death or notice of the death of the testator, it was admitted that the bank, who continued their advances up to May, 1878, to the firm of E. & J. Clementson, were entitled to recover under this guarantee a large sum of £3000 or thereabouts, which, in case of difference, is to be settled hereafter by a referee.

The cause was tried before myself and a special jury at Liverpool, when it was agreed that the jury should be discharged, and that the Court should have power to draw all reasonable inferences of fact.

The evidence as to what had passed between the bank and the defendant as Nathaniel Lawton's executor, after Nathaniel Lawton's

death, is not very clear. From a feeling of mutual courtesy the parties refrained from cross-examination of one another at the trial.

It appeared that the bank knew of the death of Mr. Lawton, but had received no written notice of it addressed specially to themselves. On the 12th of February, 1876, however, the defendant as executor had published in the proper newspapers advertisements under 22 & 23 Vict. c. 35, requiring the creditors of the deceased Nathaniel Lawton to send in particulars of claims to the solicitors of the executors on or before the 14th of May, 1876. The bank and their officers were cognisant of this advertisement, as well as of Nathaniel Lawton's death.

Under the testator's will one-third of his estate was to be in trust for the children of the testator's sister Sarah who should attain twenty-one years in equal shares, one-third for the children of his deceased brother John Lawton who should attain twenty-one, and the remaining one-third to the brother of the testator, M. H. Lawton. Some of the children were minors. M. H. Lawton, before any claim made by the bank, got his share and spent it.

It was admitted that the bank knew who were the executors, and that, without knowing the terms of the will, the bank knew that the estate was going, one-third of it to the testator's brother, and two-thirds to the children of the testator's brother and sister, some of whom were infants.

The defendant, who was a brother of the partners in the [* 45] guaranteed *firm, Messrs. E. & J. Clementson, had become

liable to the bank as a guarantor jointly and severally with Nathaniel Lawton under the guarantee in question. He called at the bank shortly after the appearance of the advertisements, and saw the manager, Mr. Coulthart. The following is the account given by the defendant of the interview: "I went to the bank to see if they could advance some money on a large public building, the Conservative Hall, and Mr. Coulthart agreed to do so. Then he said, 'I see by the notice in the paper that your brother-in-law is dead. Do you know that you are responsible for £3000?' and I was not aware of it, but was quite agreeable to be so, knowing my brother to be in good circumstances. He asked me how they were doing. I told him I knew all their affairs, and told him they were doing as well as they could be doing at the time. That is all

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that passed to the best of my recollection. We should never have paid the share out if we had thought it was subject to liability."

The defendant was not cross-examined, but it was stated on behalf of the bank that Mr. Coulthart's recollection of the conversation differed from the defendant's, and by consent a written memorandum of the interview made by Mr. Coulthart at the time was put in as containing the substance of the evidence which Mr. Coulthart was prepared to give, and was to be taken as if he had actually deposed to it.

The memorandum was as follows: —

"Mr. Clementson called, and said he would sign a new letter of guarantee for £4000 or allow the existing ones to continue, as might be most agreeable to the directors."

In May, 1878, the guarantee firm, Messrs. E. & J. Clementson, fell, as I have stated, into difficulties. The bank to whom they were indebted heavily for advances, exceeding the amount of the guarantee, claimed under the guarantee to be repaid the same by the defendant as executor of the testator, and brought this action.

For the defendant it was contended that the testator's estate was not liable for any advances made after the testator's death, or, at all events, after the bank received notice of his death. For the bank it was argued that no notice was given which was equivalent to a notice of the withdrawal of the guarantee, and that *the proper inference to be drawn from these facts [* 46] was that the bank had a right to and did still suppose that the guarantee was to continue.

If it were established that, after the death of the testator the parties had dealt together on the footing that the guarantee was at an end, the case of *Harriss v. Perrett*, L. R. 15 Eq. 311, 8 Ch. 866, would apply, and the bank would not be liable. But I do not decide this case on that ground, though I am not convinced, on the present materials alone, that the bank may not, after the testator's death, have been looking to the defendant's liability as joint and several guarantor on the guarantee, and have considered the guarantee determined as regards the testator and his estate.

It is possible, on the other hand, that the executor himself supposed the guarantee to be at an end, while the bank entertained no definite opinion on the subject. It would be difficult for me to express any clear view about the matter, as the evidence leaves me

still in some doubt about it. It is not necessary, if my judgment be well founded, to decide the point.

I am of opinion that the notice with which the bank in the present case was affected amounted to a discontinuance, so far as future advances were concerned, of the guarantee. A guarantee like the present is not a mere mandate or authority revoked *ipso facto* by the death of the guarantor. It is a contract, and the question from what time and on what notice it ceases to cover advances is a question of construction of the contract itself. In the case of such continuing guarantees as the present, it has long been understood that they are liable, in the absence of anything in the guarantee to the contrary, to be withdrawn on notice. Various explanations have been offered of this reasonable, though implied, limitation. The guarantee, it has been said, is divisible as to each advance, and ripens as to each advance into an irrevocable promise or guarantee only when the advance is made. This explanation has received the sanction of the Court of Common Pleas in the case of *Offord v. Davies*, 12 C. B. (N. S. 748, 31 L. J. C. P. 319. Whether the explanation be the true one or not, it is now established by authority that such continuing guarantees [*47] can be withdrawn on notice during the *lifetime of the guarantor, and a limitation to that effect must be read, so to speak, into the contract. But what is to happen on his death? Is the guarantee irrevocable and to go on forever? It would be absurd to refuse to read into the lines of the contract in order to protect the dead man's estate a limitation which is read into it to protect him while he is alive. On the argument of the present case it was virtually conceded that the provision as to three months' notice relating only to the guarantor's life, and there being no corresponding provision as to the notice to be given on his death, the guarantee could be legally determined at any time after the guarantor's death by a proper notice to that effect. But there remains the question what is the proper notice to be given. To answer this question we must consider the change which the guarantor's death has effected in the situation. The notice cannot any longer be given by the guarantor. He is dead. The executor of his will is guardian of his estate, and if notice is to be given by any one, the executor would seem the person to give it. But must the executor give special notice that the guarantee is withdrawn; or is it not enough that the bank should be warned of the death

Nos. 9, 10. — Coulthart v. Clementson : Lloyd's v. Harper. — Notes.

of the testator and the devolution of his estate to others? In many cases the executor has no option to elect to continue the guarantee. Surely it would in such cases be idle to insist on special forms of withdrawal of a guarantee which nobody has a right to continue. Notice of the death and of the existence of a will is notice of the existence of trusts which may be incompatible with the continuance of the guarantee. If indeed, under the testator's will, the executor has the option of continuing the guarantee, then from the absence of any specific notice of withdrawal, the bank may, perhaps, in spite of notice of the death, properly assume, as against the estate, that the guarantee is not to be determined. But if the executor has no option of the sort, then, in my opinion, the notice of the death of the testator and of the existence of a will is constructive notice of the determination as to future advances of the guarantee. The bank from that moment are aware that the person who could during his lifetime have discontinued the guarantee by notice cannot any longer be a giver of notices; that his estate has passed to others, who have trusts to fulfil, and it is easy for them to ascertain what those * trusts are. If these trusts do not enable the [* 48] executor to continue the guarantee then the bank has constructive notice that the guarantee is withdrawn. If, indeed, the contracting parties desire that on the death of the guarantor a special notice shall be necessary to determine the guarantee, they can so provide in the guarantee itself: and such a provision will, of course, bind the estate. Here there is no such provision.

Judgment will, therefore, be entered for the defendants, with costs.

Judgment for the defendants.

Lloyd's v. Harper.

16 Ch. D. 290-322 (s. c. 50 L. J. Ch. 140; 43 L. T. 481; 29 W. R. 452).

[This case will be found reported as No. 12 of "ACTION" (RIGHT OF), 1 R.C. 686.]

ENGLISH NOTES.

The judgment of BOWEN, J., is criticised by ROMER, J., in *In re Silvester, Midland Railway Co. v. Silvester*, 1895, 1 Ch. 573, 64 L. J. Ch. 390, 72 L. T. 283, 43 W. R. 443; and the learned Judge there held that, where a joint and several guarantee provided that "the obligors or any one or more of them or their respective representatives might

Coulthart v. Clementson; Lloyd's v. Harper. — Notes.

determine their or his liability by a month's notice in writing," the obligation was not determined by mere notice of the death, although expressly given. But in the Irish case of *Dodd v. Whelan*, 1897, 1 Ir. R. 575, the VICE-CHANCELLOR followed the decision of BOWEN, J., and held that guarantee by a partner of a partnership account was determined when the creditor got knowledge of the death, although the guarantee was expressed to be a continuing one "notwithstanding any change in the partnership."

AMERICAN NOTES.

The contract of suretyship is generally not terminated by the death of the surety. "When the engagement of a surety is a contract, and not a bare authority, it is not usually revoked by his death, and his estate remains liable." Brandon, *Suretyship and Guaranty*, 1st ed. sect. 113. Thus the liability incurred by a surety on a guardianship bond is not discharged by his death, but continues for the full term of the guardianship. *Moore v. Wallis*, 18 Alabama, 458. In *Green v. Young*, 8 Greenleaf (Me.), 14, where a party had become surety for a deputy sheriff, his estate was held liable for misfeasance of the deputy occurring more than three years after the surety's death. See also *Hecht v. Weaver*, 34 Federal Rep. (U. S.), 111; *Hightower v. Moore*, 46 Alabama, 387; *Rapp v. Phoenix Ins. Co.*, 113 Illinois, 390; 55 American Reports, 427; *Royal Ins. Co. v. Davies*, 40 Iowa, 469; *Richardson v. Draper*, 87 New York, 337; *Holthausen v. Kells*, 45 New York Supplement, 171; *White v. Commonwealth*, 39 Pennsylvania State, 167; *Shackamaxon Bank v. Yard*, 150 Pennsylvania State, 351; 30 American State Rep. 807.

In cases of guaranty of the payment of money by a third party, the American cases do not leave it entirely clear under what circumstances the death of the guarantor will revoke the guaranty. In *Knotts v. Butler*, 10 Richardson Eq. (S. Car.), 143, it was held that a guaranty of the payment of all the notes, &c., to be made by a certain firm, to remain in force till revoked by written notice, was not revoked by the death of the guarantor.

In *Hunt's Appeal*, 105 Pennsylvania State, 128, it was held that a covenant made by a decedent in his lifetime, by which he bound himself "to be responsible for, and guarantee the payment of" the interest on a mortgage until the mortgaged premises should be so improved as to constitute adequate security for the mortgage debt, survives the death of the covenantor, and can be enforced against his personal representatives so as to recover interest accruing thereafter.

In *Kernochan v. Murray*, 111 New York, 306, where it was decided that a guarantee that a certain person should receive seven per cent annual dividends, so long as he held certain stock, was not terminated by the death of the guarantor, the Court said: "There are cases cited holding that a continuing guaranty of advances to be made to a third party, in the absence of any express provision, is revoked as to subsequent advances by the death of the guarantor and notice. (*Coulthart v. Clementson*, L. R. 5 Q. B. D. 42; *Harriss v. Fawcett*, L. R. 15 Eq. Cas. 311.) These cases stand upon a perfectly equit-

Sturla and others v. Freccia and others. — Rule.

able principle, each advance constituting a fresh consideration. But a guaranty creating a continuing pecuniary obligation, the consideration for which is entire, and given once for all, is very different, and it would be very inequitable to hold that it was terminated by the death of the guarantor, unless this intention is plainly expressed in the guaranty itself. (*Lloyds v. Harper*, L. R. 16 Ch. Div. 290.) ”

See also *Janin v. Browne*, 59 California, 37; *Menard v. Scudder*, 7 Louisiana Annual, 385; 56 American Decisions, 610; and a note in 22 American State Reports, 814.

In Massachusetts, it has been decided that a guaranty of the payment by another of the price of goods to be sold in the future, is revoked by the death of the guarantor. *Hyland v. Habich*, 150 Massachusetts, 112. See also *Home National Bank of Chicago v. Waterman*, 30 Illinois App. 535; *National Eagle Bank v. Hunt*, 16 Rhode Island, 118; *Michigan State Bank v. Leavenworth*, 28 Vermont, 209.

In *National Eagle Bank v. Hunt*, *supra*, the Court drew the following distinction: “Guaranties have been divided into two classes: one where the consideration is entire, that is, where it passes wholly at one time; the other, where it passes at different times, and is, therefore, separable or divisible. The former are not revocable by the guarantor, and are not terminated by his death and notice of that fact. . . . The latter, on the contrary, may be revoked as to subsequent transactions by the guarantor, upon notice to that effect, and are determined by his death and notice of that event.”

PROFIT À PRENDRE.

See No. 6 of “CUSTOM,” 8 R. C. 337 *et seq.*; No. 14 of “EASEMENT,” 10 R. C. 245 *et seq.*

PUBLIC DOCUMENT

STURLA AND OTHERS v. FRECCIA AND OTHERS.

(H. L. 1880.)

RULE.

To make a document a “public document” so as to be evidence of the facts stated in it, the document must be made in the course of a public inquiry by a public officer,

Sturla and others v. Freccia and others, 5 App. Cas. 623, 624.

and be kept as a public record for the information of all persons concerned.

Sturla and others v. Freccia and others.

5 App. Cas. 623-650 (S. C. 50 L. J. Ch. 86; 43 L. T. 209; 29 W. R. 217).

[623]

Evidence. — Public Document. — Statements in.

The report of a committee appointed by a public department in a foreign state, though addressed to that department and acted on by the government, is not necessarily admissible in the Courts here, as evidence of all the facts stated therein.

M., the consul in London for the then Genoese Government, applied in 1789 to his government to receive the rank and employment of diplomatic agent here. The Executive Government (*Collegii*) referred the application to a committee called the *Giunta della Marina* to inquire into the propriety of the proposed change of appointment, and into M.'s fitness for the post of diplomatic agent. The *Giunta* reported favourably on both points. In the course of the report the *Giunta* described him as "a native of Quarto of about forty-five years of age." He was appointed in 1790, and died in England in 1803. His only child, a daughter, died here in 1871 without any known relations. Her property was taken possession of by the Crown, but, on a process instituted here, a decree was made directing payment of the fund to certain persons of the Freccia family, who claimed to be next of kin, and whose claim was founded on an allegation that M. had been born at St. Ilario near Genoa in 1735. Other persons then claimed to be next of kin, asserting that M. had been born at Quarto in 1744. In a suit between these two sets of claimants the report of the *Giunta* was tendered in evidence as fixing the real place and time of M.'s birth: —

Held, that it was not admissible for that purpose.

Per Lord BLACKBURN: — "A public document" means a document that is made for the purpose of the public making use of it — especially where there is a judicial or quasi-judicial duty to inquire. Its very object must be that the public, all persons concerned in it, may have access to it.

Appeal against a decision of the Court of Appeal, which had affirmed a previous decision of Vice-Chancellor MALINS.
[* 624] * The following summary of the facts is all that is necessary for the present report.

A Mrs. Mangini Brown died in London intestate on the 21st of December, 1871, leaving personal estate to the amount of £200,000. She was a widow above ninety-three years of age. It was not known whether she had any relatives, and her estate was therefore taken possession of by the then Solicitor to the Treasury, Mr. Gray, on behalf of the Crown. A suit was subsequently

Sturla and others v. Freccia and others, 5 App. Cas. 624, 625.

instituted by persons of the Freccia family, who claimed to be Mrs. Brown's next of kin. Mrs. Brown was the daughter of Antonio Mangini, who in the early part of his life had been consul in London for the Ligurian Republic, and in March, 1876, the Chief Clerk (to whose examination the title of the claimants had been referred) made his certificate declaring that Antonio Mangini was a native of the village of St. Ilario near Genoa, and was, in 1735, baptized there as Antonio Mangini, the son of Giovanni Battista Mangini, and that the members of the Freccia family were the next of kin. The Court, on farther consideration, made an order in favour of that family. Before that order was acted on fresh claimants appeared, now represented by Madame Sturla and the other appellants, and the case they set up was that the consul was one Antonio Maria Mangini, and was born at Quarto, near Genoa, in 1744. On reference of this new claim to the Chief Clerk for examination, he reported adversely to it, and the Court then made a fresh order on the original certificate, and some of the fund was paid out under this order.

An action (*Sturla v. Freccia*) was then brought to determine these adverse claims, and the chief point in dispute related to the identity of Antonio Mangini and the place of his birth, whether St. Ilario or Quarto. On the evidence proposed to be given in that action, the present question arose.

It appeared that on the 26th of June, 1789, Consul Mangini applied to his government to be appointed the diplomatic agent of the Republic. The letter of the Consul, making the application, was referred by the *Collegii* to the *Giunta della Marina*. This *Giunta* was a body of officials consisting of three members, one selected from the senate and two others from the *Camera* or finance division of the government. The report of the *Giunta*, * dated in March, 1790, began by referring to the [* 625] details of the business required to be performed in London, and stated how much more advantageous it would be for the government, if that business was entrusted to a diplomatic agent than merely to a consul, who held no diplomatic position. It then referred to some occasions on which Antonio Mangini had well exerted himself in the business of the government, spoke of his disinterestedness in not having his postage expenses repaid him, and mentioned that it had again been commanded to obtain more precise information respecting Mangini, and proceeded thus: "Con-

Sturla and others v. Freccia and others, 5 App. Cas. 625, 626.

sul Mangini is a native of Quarto, aged about forty-five, of civil extraction, and while still young, wishing to try his fortune abroad," went to Lisbon, engaged in commerce there, then went to London and engaged in commerce there; and the report went on to give details of his life here, saying that, "Every Genoese who arrives in London and inquires about him is treated by him with courtesy" ("lo tratta con proprietà"), and it gave details of his becoming rich, living in good style, and speaking several languages, and concluded by recommending him for the appointment of diplomatic agent. He was appointed by a letter patent signed by Borelli, Secretary of State, and dated the 16th of April, 1790; and he lived here till his death, which happened in 1803. This report of the *Giunta* was offered as evidence to prove that the Consul had been born at Quarto. Its reception was objected to, and Vice-Chancellor MALINS declined to receive it as "evidence as to the place of the birth or the age of the Consul." The decision of the VICE-CHANCELLOR was affirmed by the LORDS JUSTICES, and hence this appeal.

Mr. J. Pearson, Q. C., and Mr. Wills, Q. C. (Mr. Edward Beaumont was with them), for the appellants:—

The Court below wrongly rejected a document which on every legal ground was admissible in evidence. There could be no reasonable ground for doubting that it was a perfectly genuine document. Assuming that to be so, then it was admissible by the laws of this country as a report made by public officers to their superiors, upon a matter which concerned the public service of the country, and which had been referred to them for inquiry.

[* 626] The * report was therefore essentially a public document, and required that credit should be given to its statements.

[Lord BLACKBURN. —The *Giunta* satisfied itself that Mangini was a respectable person fit to be put into the employment he asked for, that was the matter specially referred to the *Giunta*, — do you say that that makes all the rest of the document admissible in evidence?] Certainly. The document is a public document and the whole of it is admissible. The government acted upon it. The report was part of the transaction of the appointment to the office, and so admissible. *Collins v. Maule*, 8 C. & P. 504. The certificate of the Secretary at War has been received to prove that a man was a serjeant in the army and so free under the Mutiny Acts from arrest. *Lloyd v. Wooddall*, 1 W. Bl. 29. In *Stead v.*

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Heaton, 4 T. R. 669, entries by parish officers of proportions of church rates received by them were not only admitted as evidence of the fact of receipt, but as evidence to explain and settle the proportions. In *Price v. Littlewood*, 3 Camp. 288, Lord ELLENBOROUGH admitted old entries in a vestry book signed by the churchwardens, as evidence to establish a claim of title to a pew in the church of Hendon, observing that the entry was made by the churchwardens on a matter within the scope of their official authority. And even a verbal statement as to the amount of rent, made by the man who paid it, to his son, was, after that man's death, admitted in a case relating to the settlement of a pauper. *The Queen v. Birmingham*, 1 B. & S. 763. Entries made in the usual course of business are admissible. *Doc v. Turford*, 3 B. & Ad. 890 (37 R. R. 581); *Pritt v. Fairclough*, 3 Camp. 305 (13 R. R. 811). [Lord BLACKBURN. — Must they not be made at the time and in the discharge of the particular duty. *Smith v. Blakey*, L. R. 2 Q. B. 326.] And the post-mark on a letter posted in Essex, marked there, and forwarded to London on its way to Scotland, and produced with the proper post-marks on it, was received as evidence of a publication in Essex, and that it had reached its destination in Scotland. *Warren v. Warren*, 1 C. M. & R. 150, 4 Tyr. 850 (40 R. R. 547). And corporation books are admissible as public documents (Taylor on Evidence, 7th ed. s. 1781, p. 1484; Hub. on Suc. 537; *Rex v. Mothersell*, 1 Str. 93), the *principle being, that entries made by persons discharging a public duty, and in discharge of that duty, were afterwards admissible to prove the facts therein stated. As to documents kept in public offices in this country they had constantly been received in proof of the facts stated in them. A bankrupt register is so. *Arnold v. The Bishop of Bath and Wells*, 5 Bing. 316; see *Bishop of Meath v. The Marquis of Winchester*, 4 Cl. & F. 445. In *The Irish Society v. Bishop of Derry*, 12 Cl. & F. 641, entries in the books kept at the First Fruits Office were admitted to prove a collation to a living made by the bishop at a particular time, and so also were returns made by him in obedience to writs from the Exchequer requiring him to state the vacancies of, and presentations to, the livings in his diocese. They were statements made by a public officer in the discharge of a public duty. Inquisitions *post mortem* are always admissible, for the reason that they are made under commissions from the

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Crown. In *Burridge v. The Earl of Sussex*, 2 Ld. Raym. 1292, a deed of entail of an estate was recited in an *inquisitio post mortem*, which was not only admitted to prove that there had been such a deed, but, the particulars of the deed being recited therein, it was received as proving those particulars. Such inquisitions were always received in evidence in peerage cases in proof of pedigree. [Many peerage cases were referred to in proof of this statement, among these were: *The Lumley*, 1723, 22 Lords' Jour. 299; *De Roos*, 1804, Min. of Ev. 339; and *The Slave*, Min. of Ev. 1830-1835, 13, 5 Cl. & F. 38-39, claims of peerage.] In the case of the *Earldom of Devon*, Sir Harris Nicolas' Report, Append. xxiv, an *inquisitio post mortem* was admitted in proof not only of a title to lands and advowsons, but also to show by whom and in what manner they had been dealt with.

In like manner the Herald's visitations are admissible to prove pedigree. *Stainer v. Droitwich*, 1 Salk. 281; *Pitton v. Walter*, 1 Str. 162; *Matthews v. Port*, Comb. 63. These were cases at law. And in *Vernon v. Mannors*, Plowd. 425, the heralds' books were admitted to prove "cosinage" [relationship] on a question of [* 628] challenging the array. So that *the observation of Lord

Justice BRETT in the present case (12 Ch. D. at p. 433), that their admissibility is peculiar to committees for privileges, is entirely inapplicable. And in the *Shrewsbury Peerage Case*, 7 H. L. C. 1, at p. 34, it was shown how careful were committees for privileges in these matters, for there one visitation was refused to be received because the commission under which it was taken was not produced, and another was admitted because the proof of the commission, and the deputation to the heralds, had been supplied (7 H. L. C. at pp. 27, 34). And in the *Attorney-General v. Kohler*, 9 H. L. C. 654, it was expressly declared that the rules of evidence in pedigree cases had not been relaxed of late years. In all these cases the findings were those of official persons having authority to perform a duty and acting in obedience to the authority conferred on them.

Even decisions in the Courts of Chivalry were recognised, though it might perhaps be said that they were not regularly established Courts, but were, in fact, only special commissions. [Lord BLACKBURN. — It is said in Comyns' Digest, Tit. Courts, E. 2, that "the Court of Chivalry has an absolute jurisdiction by prescription in matters of honour, pedigree, descend, and coat

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armour," and a case in Modern Reports is quoted as the authority *Russell's Case*, 4 Mod. 128.]

Funeral certificates produced from the Heralds' College, taken by the Officers of Arms under orders from the Earl Marshal, are admissible in evidence to prove the facts stated in them. *The Fane Peerage*, 5 Cl. & F. 526-541. The reason being that the certificates were made by official persons in the discharge of the duties of their office. Such persons have a duty to perform and have no interest to misrepresent. [Lord BLACKBURN. — That goes to the weight of the evidence, not to its admissibility.] But where an entry was recorded by an appointed official not in the discharge of his duty, that entry, though produced from the proper custody, would not be admissible in evidence, for it must be made in discharge of a duty, that distinction being taken more than once in the *Shrewsbury Peerage Case*, 7 H. L. C. 1. But these conditions being complied with, it is admissible to prove the facts stated in it.

* The recitals in private Acts of Parliament as to property were once admissible: *The Wharton Peerage*, 12 Cl. & F. 295; though they are not so now, because those Acts are no longer submitted to the previous adjudication of the Judges: *The Shrewsbury Peerage Case*, 7 H. L. C. 1; while they were so they had a very high authority. Per Lord LYNDHURST, L. C., *Wharton Peerage Case*, 12 Cl. & F. 302.

It is submitted, therefore, that this document being a report made by a public body on a matter into which that body was directed to inquire—made to the government of the Republic and acted on by that government, is a public document of state, to which credit is to be attributed, and is admissible in evidence to prove the facts stated in it. All the reasons which render public documents in this country admissible in the Courts here, apply in full force to this document, which ought therefore to have been received, and was improperly rejected.

Mr. Napier Higgins, Q. C., Mr. Bagshawe, Q. C., Mr. Everitt, and Mr. Benjamin Eyre, appeared for the respondents, but were not called on to address the House.

Mr. Rigby was for the trustees of the fund.

The LORD CHANCELLOR (Lord SELBORNE):—

My Lords, the question on this appeal is one as to the reception

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of evidence. The document in question, a report of certain persons called the *Giunta di Marina* at Genoa, is sought to be put in evidence for the purpose of proving that a person who was formerly consul for the Genoese Republic in London, and the succession to whose daughter Mrs. Brown, is now in question, was a native of Quarto near Genoa, and at the time that report was made, aged about forty-five years. The document has been tendered for that purpose and for that purpose only.

My Lords, upon that question of evidence it is that we have heard an argument at very great length, the case having been very ably presented on the part of the appellants. I believe none of your Lordships thinks it necessary to hear the respondents on that point. The evidence has been rejected by the Courts [* 630] below, * and I think all your Lordships are of opinion that its rejection was unavoidably necessary, by reason of the rules applicable to questions of this kind, in the law of England.

There is abundant proof that the report, which contains the passage it is desired to use, is an authentic public document of the Genoese Government, to which, so far as the good faith of those who made it is concerned, credit might be justly given on any occasion on which it might properly be used. But your Lordships, in this case, have to consider what is the nature of that report, and how far the statements contained in it can be brought within the rules of the English law of evidence as to the proof of pedigree.

The nature of the report is this: Mr. Mangini had been consul in London for about ten years, and desired to be advanced to a somewhat higher authority as agent of the Republic. He had made application in writing for that appointment. He was at that time, and he remained afterwards, in London. There is no evidence before your Lordships as to any relatives of his at Genoa having had anything to do with the statements contained in this report, nor is there any evidence to connect any of those statements with representations proceeding directly from Mr. Mangini himself. The public authority at Genoa, with whom rested appointments of this description, was called the *Collegii*, being, in point of fact, a joint assembly of certain members of the Executive Government of Genoa and the Senate. With them appointments of this description appear to have rested. It seems to have been a common practice of theirs (whether universal, I will not assume

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one way or the other) to refer applications of this kind to a species of executive sub-committee, which was called the *Giunta di Marina*, or Navy Board. Why it was so called does not very clearly appear. That committee was composed, if I am not mistaken, of two members of the senate and one of the finance board. The nature of the reference appears upon the face of it. It was to learn what could be known about the fitness of the person who had made application for the appointment in question, and to report the result to the *Collegii*, with whom the appointment rested. In fact it was an executive sub-committee to assist a department of the government, by collecting and reporting information, either as to applicants for public appointments generally, or as to applicants for appointments of this particular kind.

* It does not appear that any particular rules were [*631] prescribed to them as to the kind of information which they should collect; still less as to the evidence which they were to require to substantiate such information. What the law of Genoa as to legal evidence may be, we do not know; and certainly there is nothing here from which we can be entitled to assume that it is the same as the law of England upon matters of this kind. Whatever it is, there is nothing to lead to the conclusion that, in the discharge of this particular duty, the persons composing the sub-committee of the Executive Government of Genoa were bound to confine themselves to any particular description of evidence, whether of that kind which the law of Genoa would be satisfied with in judicial proceedings, or of the kind which the law of England requires in such proceedings; and to assume, in point of fact, that they were obliged to limit themselves to that sort of information which we should regard as evidence, in matters of this description, in the Courts of this country, would be, to say the least, a violent and unreasonable supposition.

The report which they made contains the history of what they had collected, in some way or other, as to the life of this gentleman. I have no doubt whatever that they received information, which they thought was correct, upon all the points comprehended in that report; but whence that information was received does not at all appear; certainly it does not appear that it, or any part of it, was received from any member of Mr. Mangini's family. We may conjecture, not unreasonably, that if this committee in Genoa

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was acquainted with members of the Mangini family resident in or near that city, it may have had recourse to them; but there is nothing to show that in point of fact this was done, or that there were no other means by which the *Giunta* might have obtained such information as is contained in the report. If your Lordships look through that information, you find it concludes by stating that every Genoese who, during the time Mr. Mangini had been consul in London, had occasion to ask for his good offices, had been received by him with courtesy and hospitality, and was very well satisfied with the manner in which Mr. Mangini discharged his duties as consul. The *Giunta*, therefore, had probably been in communication with some persons who [* 632] had * become acquainted with Mr. Mangini, in the discharge of his duties as consul in London, and there is nothing to show that all the information received may not have been obtained from some such persons; and, if from them, there is nothing to show whether those persons obtained the information from Mangini himself, or from others who were acquainted with him and talked about him. There is nothing to show that at that time there were not people living at Genoa who, though not his relations, were more or less acquainted with Mr. Mangini, who might have heard these things from others, and from whom this information might have been obtained. That those persons obtained their information from the members of Mangini's family, or from Mangini himself, is of course quite possible; — it may be so, but that is a mere conjecture, which has no element of reasonable certainty about it. If, therefore, it is necessary that the information received by the *Giunta* which is contained in this report should be founded on statements proceeding from Mangini himself, or from some member of the family to which Mangini belonged, to make it admissible in evidence for the purpose for which it is tendered, there is not anything either in the nature of the case, or in the tenor of the report itself, or in any other evidence which has been brought to your Lordships' knowledge, to lead to that conclusion; and, my Lords, I am of opinion that it is necessary, by the law of this country, in order to make this report receivable in evidence, that it should at least appear to have been founded upon statements made by members of Mangini's family or by Mangini himself.

My Lords, several classes of cases in which evidence, not de-

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pending upon the oath of persons who have personal knowledge, is received in matters of pedigree, by the law of this country, have been referred to at your Lordships' bar. It appears to me that none of those classes of cases has really any tendency to support the appellants' proposition. Two of them may be laid aside at once, — those which consist of declarations made against the interest of the persons making them, and those which relate to entries made in the course of business by persons whose duty it was to make those entries. They may both be laid aside; because, besides other conditions to which I need not particularly advert, *they both involve this, as a neces- [* 633] sary element, that the subject-matter of the declaration in the one case, and of the entry in the other, must have been within the direct personal knowledge of the person making the declaration, or making the entry. That can have no application here.

Then, my Lords, other classes of cases were referred to, namely, the findings of competent public officers, Courts, or persons having legal jurisdiction to inquire, under public authority, into matters within that jurisdiction: as in the cases of inquisitions and visitations of heralds under commissions from the Crown. I do not, my Lords, think that cases of that kind have any bearing at all on this matter. It does not appear that this *Giunta di Marina* had any legal jurisdiction whatever. Its members were not in the nature of a Court, not in the nature of persons who, like the heralds, had authority by law, for a public purpose, to make particular inquiries, whose duty it was, in the exercise of that authority, to proceed upon just proof, and who may be presumably supposed to have discharged that duty properly, and to have taken such proof, and only such proof, as the law of the country required concerning the several matters before them.

Another species of evidence was referred to, analogous to that, but distinguishable from it; namely, funeral certificates entered in the heralds' books. They stand upon this ground. It was the official duty of the heralds to receive such certificates from persons who were by law competent witnesses, and to record the statements of those persons in their books. Therefore, from the fact of their being so recorded it is reasonably to be presumed, that the duty was duly discharged: it is evidence, that they did receive from persons, who were competent witnesses, such declarations. To go now into particular cases, and to consid-

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whether or not the evidence of books or documents of that nature should have been received in any particular instances which may be more or less open to criticism, appears to me to be unnecessary. This case is quite different. This *Giunta* was not a body which had any such legal jurisdiction: it was not a body which is shown to have been, or which can be presumed to have been, bound to proceed on any such kind of proof. It appears to me to have been perfectly open to its members to receive any [* 634] species * of information, on hearsay or otherwise, to which they themselves at the moment thought credit could be given; and, therefore, I am unable to apply to them any analogy derived from the cases of Courts, commissioners, or other persons having a special duty or authority under the English law to make particular kinds of inquiries, to whose inquests or recorded proceedings credit is *primâ facie* given.

My Lords, I do not think it is necessary to dwell farther upon the case. Some ground must be shown for the reception of a document of this kind as evidence. It appears to me, my Lords, that no ground has actually been shown, and under the circumstances I think your Lordships must decline to receive it. Of course that does not necessarily dispose of the case; although, from what we have heard at your Lordships' bar, it is not improbable that in effect it may do so.

Lord HATHERLEY said that he was entirely of the same opinion.

[639] Lord BLACKBURN:—

My Lords, I am also of the same opinion. In deciding the present question I assume—what I believe is a matter of controversy—that this document is a genuine document, actually being what it purports to be, and satisfactorily proved to be what it purports to be.

My Lords, having stated that, I inquire whether or not it is admissible evidence (its weight is another question) to prove that the consul Mangini, about whose next of kin the inquiry is, was born at Quarto in a particular year. That is what it amounts to in the result. It may be some evidence of more or less weight tending towards that, but I do not think it is evidence of it, and I will proceed to state the reason why.

I shall not attempt in so doing to enter upon a full inquiry into

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the law of evidence. I do not believe it would be possible, and I do not believe it would be proper in such a case, because one * might be inadvertently ruling disputed points. But, [* 640] so far as it is necessary to decide this case, one must express an opinion. It is not disputed that the general rule of English law is that hearsay evidence is not receivable, one reason probably is the want of the safeguards of cross-examination; however, undoubtedly, the law is that, as a general rule, hearsay evidence is not admissible. But to that a great many exceptions have been introduced. I do not say that if we were but beginning to make the law, we should be able to say exactly why so much should be admitted and no more, probably it would be difficult to say that in all cases; but the exceptions have been established and exist, and we have to see whether this case comes within any one of those.

Now, my Lords, the first and one of the most important exceptions is briefly expressed in a *dictum* in *Higham v. Ridgway*, 10 East, 109 (10 R. R. 235), that documents on the face of them appearing to be against the interest of a deceased person who stated the matter, are evidence. I need not enter into the qualifications of that farther than to point out that in no point of view can this *Giunta di Marina* who made this statement (and who presumably are all dead by this time) be said to have been making statements against their own pecuniary interests.

Then, my Lords, there is a second class of cases, of which *Price v. Lord Torrington*, 1 Salk. 285, 2 Ld. Raym. 873, may be mentioned as being the earliest, establishing that where a deceased person in the course of his duty makes a contemporaneous entry of an act which he has done, and returns that in the course of his business, then after his death it would be received as evidence. That class of cases is also well established. There again I do not go into the qualifications, or express any opinion upon the different matters introduced, farther than to point out that in no sense can it be said that the *Giunta di Marina* was making any statement in the course of business contemporaneous with the fact, and it is impossible to say that it falls within that principle.

Then, my Lords, comes another large class of cases, where, from the nature of the thing, evidence of reputation from deceased persons is admissible—where it is a public right or a quasi-public right, evidence of reputation is admissible if you prove

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[* 641] that the * deceased person was of the class who would know it, and had stated it. Upon that again I merely say that the question we are now inquiring into, viz., the history of a private individual, is not a matter in which, in any sense, reputation generally can be received.

Then, my Lords, there is another class of cases which comes nearer to it. It has been established for a long while that in questions of pedigree, — I suppose upon the ground that they were matters relating to a time long past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice, — but for whatever reason, the statement of deceased members of the family made *ante litem motam*, before there was anything to throw doubt upon them, are evidence to prove pedigree. And such statements by deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted upon them, or assented to them, or did anything that amounted to showing that they recognised them. If any member of the family, as a person who presumably would know all about the family, had stated such and such a pedigree, that evidence would be receivable, its weight depending upon other circumstances.

Now if, in this case, there had been any evidence whatever showing that Mangini himself had told this *Giunta di Marina* that he was born at Quarto in a particular year, that would clearly have been evidence, if it was believed to be genuine: indeed it would have been almost irresistible evidence. But there is not the slightest pretence for saying he did so. His written communication to the Genoese Government does not say a word about where he was born, or his age. He did not think it material or necessary when he was seeking to be appointed agent, to tell them. If it could be shown that the *Giunta di Marina* when making this inquiry, and prepared to make this report to the government, had asked Mangini the question, the statement would have been taken as evidence to show that Mangini had said it. Or if it could be shown that the *Giunta* had asked other members of the family, and that they had said it: that might be evidence. It might be a question of how that could be shown, but if that was shown upon admissible evidence, then it would become a

[* 642] question * whether it would be itself admissible evidence on the ground that it was a statement by a member of the

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family. But there is no pretence for saying that any one of these things is proved. What does appear is that the *Giunta*, for some reason which I cannot tell, thought (I give them credit for really thinking so) that this Mangini had been born at Quarto, and was now forty-five years of age, and they wrote that down. Upon no principle that has hitherto been stated could that be admissible evidence.

But, then, there comes another class of cases on which the argument principally rested; for it is only within that class of cases that the learned counsel for the appellants in their able argument have made any serious struggle to show that this document is admissible. It is an established rule of law that public documents are admitted for certain purposes. What a public document is, within that sense, is of course the great point which we have now to consider. Public documents are admissible, and I think I can hardly state it better than by quoting what Mr. Baron PARKE said in delivering the opinion of the Judges in the case of *The Irish Society v. The Bishop of Derry*, 12 Cl. & F. 641. His Lordship there says (12 Cl. & Fin. at p. 668), "The fifth exception related to an entry in one of the books of the First Fruits Office of the collation and admission of John Freeman to the Rectory of Camus. Writs were issued from the Court of Exchequer to the bishops to ascertain the value of the first fruits and twentieths, and returns were made by the bishops. Search for the writs and returns was made, and the book was offered as secondary evidence of returns. We think the entry was properly received." That was the point decided,—that the writs having been issued to the bishop to return the first fruits in his diocese, and the return of them being presumably lost, as it could not be found, the entry in the First Fruits Office (the copy of it) was good secondary evidence of the return. Of course, that involved in it that the return itself would be evidence. Then his Lordship says, "The writs related to a public matter,—the revenue of the Crown, and the bishops in making the return discharged a public duty, and faith is given that they would perform their duty correctly; the return is therefore admissible on the same principle on which other public documents are received."

* It was contended that the bishop could not be permitted [*643] to make evidence for himself" (that is one objection which he meets) "and, therefore, that the entry though admissible be-

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tween other parties was not to be received for the bishop; and the case was compared to an entry in the book of a union, of a surgeon's attendance, *Merriek v. Waking*, 8 A. & E. 170, and the receipt of a certificate in a parish book, *Liver v. Debenham*, 2 B. & Ald. 185 (20 R. R. 401), which have been rightly held to be inadmissible for the surgeon in one case, or the parish keeping the book in the other. But neither of these was an entry of a public nature, in the proper sense of that word; the former was a memorandum, intended to operate as a sort of check to the surgeon, the latter a memorandum for the parish officer, concerning merely the particular parish and its rights with relation to another." Then he goes on to say, "In public documents made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not." Then he puts the case of the person who made a marriage register turning out to be interested, and says that would not prevent the register being received as evidence.

Now, my Lords, taking that decision, the principle upon which it goes is, that it should be a public inquiry, a public document, and made by a public officer. I do not think that "public" there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be "public" within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said [*644] to be *quasi-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards.

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In many cases, entries in the parish register, of births, marriages, and deaths, and other entries of that kind, before there were any statutes relating to them, were admissible, and they were "public" then, because the common law of England making it an express duty to keep the register, made it a public document in that sense kept by a public officer for the purpose of a register, and so made it admissible. I think as far as my recollection goes, although I will not pledge myself to its accuracy, and so far as I have ever heard anything cited, it will be found that, in every case in which a public document of that sort has been admitted, it has been made originally with the intent that it should be retained and kept, as a register to be referred to, ever after.

Taking that view of the matter, I think it becomes clear that this document is not evidence. Supposing this inquiry had been carried on under the authority of the English Crown, and the English Crown had required of a magistrate that some confidential report should be made, it would not be public in one sense, but it would be public in this sense, that it would concern the Crown, and, from common respect for the Crown, one would suppose that what the magistrates told the Queen would be what they firmly believed and considered they had good reasons for believing, but I do not think it would come within the sense and meaning of the rule that a public document would be admissible as evidence, on the ground that a public officer, in making the statement for the public, was likely to speak the truth and must be presumed, *primâ facie*, to have known and to have spoken the truth. I am not aware of any decision which says that, in such a case as I have supposed, the document would be received. I do not believe any one has ever tried to put in such a document, and therefore I do not think there is or can be any authority to the contrary. Nevertheless that would illustrate the principle.

Every other case that I am aware of falls within the principles of one or other of the limitations I have stated. The visitations of the heralds were proof. There the Court of Chivalry was a * prescriptive Court, and the object of the Court of [* 645] Chivalry and the inquiry of the heralds — I do not stop to inquire whether the heralds were independent officers, or a branch of the Court of Chivalry, and it matters not — the very object and purpose there was, that they should inquire into arms and pedigrees for the very purpose of making a register of them, and for

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both these reasons it is clear that, when the visitation of the heralds appointed for these purposes had been made, those things could be, and they always have been received as evidence. There seems to be some misapprehension that they were received in committees of privileges as to peerages on the ground that there was some peculiar rule there. They were received, as was proved by several of the cases cited, on trials at Nisi Prius where evidence of pedigree was required. Here I may observe that in all these cases, where you have got the means, by a public document, of proving a fact, the question whether that fact is of importance or not must depend on the subject of the inquiry. If the document proves that a deceased member of the family had authenticated a pedigree, of course that becomes as strong evidence as you can have, if pedigree was the subject of the inquiry there.

I rather think that in one or two of the cases mentioned in peerage inquiries about the funeral certificates, that was the ground of the decision. I rather think, but I should not like to be too sure about it, that the book of the heralds which was produced had a copy of all the certificates of the funerals which had been returned by those who attended the funerals; and the case in Shower's Parliamentary Cases, *Oldis v. Donmille*, Sh. P. C. Ed. 1698, p. 58, at p. 65, shows what the practice was of heralds attending the funerals of great men. I think the effect of what was decided was that that was good secondary evidence of the certificate, just as in the case of *The Irish Society v. The Bishop of Derry* it was decided that the First Fruits Book was good secondary evidence of the returns. Then, it being established in the Peerage cases that there was a certificate signed as required by the Earl Marshal, by the executors, in both the cases which were cited, that certificate when produced did state on the face

of it, that the executor who signed it was a near relation, [* 646] * I think in the *Pauc Peerage* he appeared to be a son,

and in the other he appeared to be a near relation, I say, taking them to be signed in that way, of course the document that was produced became extremely cogent evidence of pedigree. It would not probably have been evidence of anything else — not of reputation. It might have been evidence of reputation where reputation was admissible, but it was only because pedigree was the subject of the inquiry.

Frequently in the cases cited, or many of them, half-a-dozen

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different reasons have been given, which might be all good or bad, for admitting the evidence. Take, for instance, the case in the third volume of Campbell of *Price v. Littlewood*, 3 Camp. 288, where the question being about a private right to a pew, the Judge admitted the entry and gave two reasons, saying, first of all, that it was evidence of reputation. I confess I think that was a mistake. I do not see how the ownership of a pew can be a matter of reputation; perhaps I am wrong. Then, secondly, he said that it was a public document. Now, I have considerable doubts whether the entry in the vestry there, was public enough to make it a public document, but it might be that the entry in the vestry was intended for the information of all the parishioners who liked to come and see it. Supposing, in the case of *Arnold v. The Bishop of Bath and Wells*, 5 Bing. 316 (30 R. R. 613), the entry had been made by the bishop on his visitation that such and such a man was the clergyman of the parish, and had been admitted some twenty years before, *secundum consuetudinem*, and suppose it was wrong to admit him, that falls completely within the principle which I think the case of *The Irish Society v. The Bishop of Derry* establishes. It seems to me that it is clearly within that principle. The bishop made his visitation, and recorded it with the wish and intent that it should be kept publicly as a register, to be seen by everybody in his diocese. If the bishop had not the right to make such an inquiry, so as to make it evidence in future, that is another affair; but if he had, then he was a public officer performing what he thought a public duty, with the view and intent that it should be public.

Now, my Lords, taking all that into consideration, can the document in this case be said to come within that class of cases?

* I think it is impossible to look at it in that way. [* 647] There is not the slightest evidence, or the least circumstance, to lead me to the conclusion that it was even intended that this private and confidential report should be seen by Mangini or anybody interested in it. It was meant for private information, to guide the discretion of the government. It was not like the bishop's return of the first fruits, for the public information, to be kept in the office and to be seen by all in the diocese who might be concerned when there came to be any litigation. But this was meant as a private and confidential report, and it certainly seems to me, according to common sense, that it ought not

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to be received. But I base my judgment upon this, that no case has gone so far as to say that such a document could be received; and clearly, unless it is to be brought within some one of the exceptions, it would fall within the general rule that hearsay evidence is not admissible.

Lord WATSON: —

My Lords, I also am of opinion that this document is not admissible as evidence. I listened with very great pleasure to the argument at the bar, which, so far as I was concerned, was a very instructive one; but I noted in the course of the argument, whilst the law on various points was very fully elucidated, the difficulty, that the appellants' counsel had to contend with throughout, was to bring the facts of their case within the rule of any of the authorities which were cited by them.

My Lords, I concur in the views which the noble and learned Lord on the woolsack and the noble and learned Lord opposite have expressed as to the difference between this case and the cases dealt with in those authorities. I do not think it necessary to make any farther reference to them, because, being of opinion that the present case is not ruled by them, I must deal with this case upon its own merits.

Now, my Lords, I have not been able to find in the authorities cited, any warrant for holding that secondary evidence is admissible according to the law of England, where there exists no reasonable presumption that the statement offered in evidence was

derived, either from the personal knowledge of the party [* 648] who made it, or * from some legitimate source. — I mean legal evidence. I think in all those cases where it is admissible, secondary evidence is admitted as a substitute for primary evidence, and can only be received when it plainly appears to be either directly drawn from that which would have been primary evidence, or drawn, not directly, but by some one competent to infer the result, from legal evidence under his consideration.

My Lords, one of these presumptions, I think, is excluded by the circumstances of this case. I mean personal knowledge on the part of those members of the committee who drew up the report of 1790. On the other hand, it does not appear to me that either the terms or the character of the report warrant the suggestion that

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there was legal evidence before the committee, upon which the members of that body arrived at the results which they reported for the benefit of those who were appointed to exercise an act of patronage.

My Lords, it does not appear to me that the duty cast upon the committee necessarily, or even by fair implication, involved the necessity of making any quasi-judicial or strict inquiry into the circumstances which they were about to report. I do not think that the duty cast upon them differs in the slightest degree from the duty which is incumbent upon every department of state, or individual officer of state, to whom is entrusted the patronage of government office. It is their duty to satisfy themselves that the person whom they are about to appoint is fitted and qualified for the office which they are about to confer upon him; and, where there are several candidates, it is their duty to make up their minds, upon a fair estimate of their various qualifications, which shall be preferred to the office. It is quite competent, as is the case here, for any person entrusted with the right of patronage to delegate that duty, as has been done here, but that does not appear to me by any means to alter the character of the duty, or the character of the inquiry which that duty involves, in order to its being satisfactorily performed.

Now, my Lords, I venture to say there is nothing here to suggest, and there is nothing in any analogous case in my power to suggest, which involves the duty of proceeding according to strict legal rules. The sort of commission that was given here was one *of a very roving description, to find out every [* 649] little circumstance, whatever it might be, wherever they could pick it up, and in whatever manner they could ascertain it. Accordingly, we were referred to various documents of similar character; and those by their tenor very strongly support the view that the inquiry made was of the character that I now state. They were not appointed to inquire into any specific fact; they were not appointed to inquire into age, or place of birth; and, accordingly, in many cases they obviously did not so inquire, as they do not report these particulars.

My Lords, I cannot conceive, when you take these circumstances into consideration along with the undoubted fact that this was not made for the purpose of being recorded in a public register, that it can have the authority of a public register. No doubt the document survives, but the mere fact that a document

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intended for a temporary purpose of this kind, is found, after a long lapse of years, in the archives of a government office, does not constitute it of the authority of a register. The purpose of this document was ephemeral, and was at an end the moment the appointment was made; and it would be a very singular fact if the law of England were to give such an authority to this one report, when the investigation in the cases of all the unsuccessful candidates, and the reports in their cases, must have been of precisely the same weight and authority as this; there is no difference between them. The results of the investigations, and the steps taken to investigate, appear to me to have been, in the case of Mangini at all events, entirely without the knowledge of the parties concerned.

I have no hesitation, under these circumstances, upon the facts of the case itself, and seeing that no direct authority can be adduced in support of the appellant's contention (and no authority which in my mind warrants the principle), in saying that this is a document which cannot be reasonably presumed to be founded upon legal testimony, and one which cannot be received in evidence. I fully concur in the result which your Lordships have arrived at.

Mr. Pearson intimated that he could not support the case if that document was rejected.

[650] *Order appealed from affirmed, and appeal dismissed with costs.*

Lords' Journals, 18th June, 1880.

ENGLISH NOTES.

The above case contains, especially in the reasons of Lord BLACKBURN, an exposition, on the highest authority, of the principles on which public documents are admissible in English Courts as evidence of the statements contained in them. This judgment is cited, and the principle expressly followed, by Lord Justice CHITTY in the Court of Appeal in *Erens v. Merthyr Tydfil Urban District Council*, 1899, 1 Ch. 241, 252, 68 L. J. Ch. 175, 178. The issue in the case was whether a certain piece of land was subject to commonable rights. The document in question was a survey and a report made by a surveyor in 1816, in discharge of a duty imposed upon him by the 8th section of the statute 34 Geo. III. c. 75, upon the occasion of a sale of Crown lands, and produced out of the proper custody (The

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Land Revenue Office). This was held admissible. Lord Justice CHITTY said: "I think it was admissible on the ground that it was a document of a public nature. The survey and report were made pursuant to the public statute 34 Geo. III. c. 75, s. 8, and were required as a necessary condition precedent to the sale of the Crown Manor by the commissioners. The statute was one of general public interest; it put restriction on the sale of Crown lands by the Crown or the commissioners, acting on behalf of the Crown. I think that the document complies substantially with the tests stated by Lord BLACKBURN in *Sturla v. Freccia* (p. 672, *ante*), where he says that there should be a public inquiry, a public document, and that it should be made by a public officer." The other members of the Court (LINDLEY, M. R., and VAUGHAN WILLIAMS, L. J.) arrived at a similar decision. LINDLEY, M. R., citing *Smith v. Earl Brownlow* (1869), L. R. 9 Eq. 241, 39 L. J. Ch. 636 n., where, in a suit for establishing a right of common over certain land as belonging to the wastes of a manor of B., a survey made in 1607 by the direction of the Crown, of the Court and Manor of B. under the presidency of Serjeant Dodderidge, was admitted as evidence of the boundaries and customs of the manor.

AMERICAN NOTES.

In *Evanston v. Gunn*, 99 United States, 660, the plaintiff, for the purpose of showing the direction and velocity of the wind and the falling of snow on a certain day, offered in evidence the record made by a person employed at Chicago by the United States Signal Service. In overruling the defendant's exception to the admission of this evidence, the Court said: "The admission in evidence of a record kept by a person employed by the United States Signal Service at Chicago was objected to at the trial, not because it had not been properly made, identified, and proved, but for the alleged reason that 'there was no law authorizing such records to be used in evidence, and because it was not competent testimony.' . . . It may be admitted there is no statute expressly authorizing the admission of such a record, as proof of the facts stated in it, but many records are properly admitted without the aid of any statute. The inquiry to be made is, what is the character of the instrument? The record admitted in this case was not a private entry or memorandum. It had been kept by a person whose public duty it was to record truly the facts stated in it. Sects. 221 and 222 of the Revised Statutes require meteorological observations to be taken at the military stations in the interior of the continent, and at other points in the states and territories, for giving notice of the approach and force of storms. The Secretary of War is also required to provide, in the system of observations and reports in charge of the chief signal officer of the army, for such stations, reports, and signals as may be found necessary for the benefit of agriculture and commercial interests. Under these Acts a system has been established, and records are kept at the stations designated, of which Chicago is one. Extreme accuracy in all such

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observations and in recording them is demanded by the Rules of the Signal Service, and it is indispensable, in order that they may answer the purposes for which they are required. They are, as we have seen, of a public character, kept for public purposes, and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure. They come, therefore, within the rule which admits in evidence 'official registers or records kept by persons in public office in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observation.' Taylor, Evid. sect. 1429; 1 Greenl. Evid. sect. 483. To entitle them to admission it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty. 1 Greenl. Evid. sect. 496."

In *Cushing v. Nantasket Beach R. Co.*, 143 Massachusetts, 77, which was a petition for the assessment of damages caused by the taking by a railroad corporation of land of the petitioner, it was held that recent reports made by one of the corps of United States engineers, transmitted by the Secretary of War to the United States Senate, and by that body ordered to be printed, were inadmissible in evidence for the purpose of showing that the road bed of the corporation protected the remaining land of the petitioner from being washed away by the sea, and that a special benefit was thus received by the petitioner from the location of the railroad. The Court, citing the principal case, said: "The acts of Major Raymond and assistant-engineer Bothfield, in surveying the headland in the town of Hull, cannot be called acts of state, nor are the facts stated in the reports public facts, in the sense that they are facts which the United States have, under the authority of law, undertaken to ascertain and make public for the benefit of all persons who may be interested to know them; but they are facts which have been ascertained in the course of preliminary surveys made for the purpose of determining what action, if any, the national government may thereafter take for the purpose of protecting Boston Harbor. The engineers who made the surveys can be called as witnesses in the same manner as other persons who have knowledge of the facts. There is no necessity for the admission of unsworn written statements, and the facts do not bring the case within any known exception to the rule that evidence must be given on oath by persons speaking to matters within their own knowledge and liable to be tested by cross-examination."

Mr. Wigmore, the latest editor of Greenleaf on Evidence, says: "An exception [to the hearsay rule] which in practice is by far the commonest in its employment is the exception admitting statements made by officials in pursuance of official duty. The necessity for the allowance of such an exception is found, not in the death of the declarant, but in the practically unendurable inconvenience of summoning public officers from their posts on the innumerable occasions when their official doings or records are to be proved in litigation. The guarantee of trustworthiness justifying the exception is usually said to be the official oath of duty; but an additional reason and requirement is in England said to be the publicity of the document, which

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ensures the probability of the correction of possible errors by the public who have access to it and the subjective incentive on the part of the official to state correctly that which the public's inspection would detect as false if he recorded falsely. [Citing the principal case.] The latter reason, as accepted in England, limits the common-law scope of the principle in its application, but it has rarely been advanced in this country; and seems, indeed, to be a modern innovation in England." 1 Greenleaf on Evidence, 16th ed. sect. 162 m.

Mr. Wigmore cites *Eranston v. Gunn*, *supra*, and *Cushing v. Nantasket Beach R. Co.*, *supra*, as the two American cases in which the reasoning of the modern English cases seems to be adopted.

Many other American decisions recognizing the admissibility in evidence of "public documents" as proof of the facts stated in them, are collected in 1 Greenleaf on Evidence, sects. 470-498; Burr W. Jones, *The Law of Evidence*, sects. 520 *et seq.*; 9 Am. & Eng. Encycl. of Law, 2nd ed. pp. 880 *et seq.*

In *Worcester v. Northborough*, 140 Massachusetts, 397, it was held that a book published under a resolve of the Legislature, authorizing the Adjutant General to publish a list of the officers and soldiers of this commonwealth in the late Civil War, and designating the name of the town or city upon whose quota the soldiers were credited, is admissible in evidence on the issue of the military settlement acquired by a soldier under a certain statute.

In *Radcliff v. United Insurance Co.*, 7 Johnson (N. Y.), 38, it was held that diplomatic correspondence communicated by the President to Congress is sufficient evidence of the acts of foreign governments and functionaries therein recited. At p. 50 the Court said: "The letter of Mr. Canning to Mr. Pinkney, of the 8th of January, 1808, would have still further corroborated the proof of the blockade, as it was decisive evidence of the intention of the English government to include St. Lucar in the blockade of Cadiz, and to carry the blockade, at the entrances of those ports, into 'the most rigorous' effect. This letter, I think, ought to have been admitted in evidence. It appears to have been printed at the city of Washington, by persons whom the defendant offered to show were printers to Congress, and to have composed part of a set of public documents transmitted to Congress by the President of the United States. A greater strictness of proof, in respect to such public matters of state, and when they are introduced collaterally, and not as matter of fact in issue, would be inconvenient, and is not now in practice required."

In *Lorton v. Gilliam*, 2 Illinois, 577, it was held that the State Register, being made by law the public paper in which the official acts of the governor required to be made public are published, is admissible to prove the existence of facts stated in a governor's proclamation, and that such a proclamation declaring who is elected to Congress is *prima facie* evidence of the facts therein stated.

So the books of assessors are admissible to prove the assessment of taxes upon individuals and for the property therein mentioned. *Roukendorff v. Taylor*, 4 Peters (U. S. Sup. Ct.), 349, 360. And the census reports, published

Printing and Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462. — Rule.

by authority of Congress, are admissible to show the population of a town. *Fullam v. Howe*, 60 Vermont, 351. And the returns of inspectors of elections are *prima facie* evidence of the number of votes cast for a candidate. *People v. Minck*, 21 New York, 539.

But official registers are evidence only of the facts required to be recorded therein. 1 Greenleaf on Evidence, sect. 493. And a government gazette, though admissible as evidence of the public acts of the government, on matters of state, is no evidence of private titles or private interests or to prove facts of a private nature. *Brundred v. Del. Hoyo*, 20 New Jersey Law, 328. See further, *Webmore v. United States*, 10 Peters (U. S. Sup. Ct.), 647.

In *Gordon v. Bucknell*, 38 Iowa, 438, it was held that the report of the Register of the State Land Office is not competent evidence to show that lands have been patented to a railroad company, the report not being "a certificate of a public officer, a copy from the records in his custody duly authenticated, or in fact any such a document as Courts will receive in evidence on account of their public character." See also *Marks v. Orth*, 121 Indiana, 10.

PUBLIC POLICY.

PRINTING AND NUMERICAL REGISTERING CO. v. SAMPSON.

(1875.)

RULE.

THE rule that a contract is void which is contrary to public policy is not to be arbitrarily extended so as lightly to interfere with freedom of contract: and a contract by which an individual anticipates the results of his future industry is not necessarily contrary to public policy.

Printing and Numerical Registering Co. v. Sampson.

L. R. 19 Eq. 462-466 (s. c. 44 L. J. (Ch. 705).

[462] *Public Policy. — Patent. Assignment. — Covenant to assign Future Patents of like Nature.*

An agreement by the vendor of a patent to assign to the purchaser all future patent rights which the vendor may hereafter acquire of a like nature to the patent sold, is not contrary to public policy.

Printing and Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462, 463.

In August, 1872, Marcus Bebro, William Ashcroft, and Simeon Sampson (the defendant in this suit) were entitled to seven-eighth shares of letters-patent relating to inventions made by Bebro, described as "inventions applicable to the mechanism or apparatus employed for numbering and printing tickets consecutively, and for containing and delivering tickets or continuous lengths of paper, or other similar materials;" and it was intended to form a company with limited liability for the purpose of purchasing and working these patents. Accordingly an agreement in writing, dated the 31st of August, 1872, was entered into between Bebro of the first part, Ashcroft of the second part, the defendant of the third part, and E. Samuelson of the fourth part, whereby the parties of the first three parts (therein called the vendors) agreed immediately after the allotment of shares in the proposed company to deduce a good title to the aforesaid shares in the said patents, and to assign the same to the company, or trustees for the company; and thereupon the company was to pay to the vendors a sum of £48,750 in such shares and at such time and in such manner as thereby provided. The agreement contained the following stipulation:—"The vendors shall enter into a covenant with the said company to assign, as and when required by the company or their directors, all future patent rights, or in the nature of patent rights, which they or any of them may hereafter acquire with respect to the aforesaid inventions, or any of them, or any of a like nature in the United Kingdom, or any part thereof, the Channel Islands, the Isle of Man, or all or any part of the continent of Europe."

The proposed company was duly registered and incorporated in *December, 1872. The agreement of the 31st [*463] of August, 1872, was carried into effect; the purchase-money was paid, and the patents were assigned by the defendant and the other persons entitled thereto; but no covenant to assign future patents was entered into as provided by the agreement.

In February, 1873, the defendant took out a patent for an invention which the directors of the company alleged to be of a like nature with those which were the subject of the agreement of August, 1872; and the directors accordingly required the defendant to assign to the company; but the defendant refused to do so; and thereupon the bill in this suit was filed by the company, seeking to compel the defendant to assign the patent in question,

Printing and Numerical Registering Co. v. Sampson. L. R. 19 E1 433, 434.

and to execute a deed of covenant to the effect stipulated by the agreement of the 9th of August, 1872.

The cause now came on to be heard. At the hearing two defences were relied upon: first, that the patent of February, 1873, was not of a like nature to those comprised in the agreement of August, 1872; secondly, that an agreement to assign future patents was against public policy, as tending to discourage inventors. This report is confined to the latter question.

Mr. Aston, Q.C., Mr. Chitty, Q.C., and Mr. Bunting, for the plaintiffs.

Mr. Southgate, Q.C., Mr. Marten, Q.C., and Mr. Hamilton Humphreys, for the defendant.

Sir G. JESSEL, M. R., after discussing the nature of the inventions which were the subject of the agreement of the 31st of August, 1872, continued:—

The buyers were about to form a company to work the invention, that means to produce tickets with numbers. That was to be their business. They were to produce and sell a commodity, the object of the invention being to produce that commodity more cheaply than had been done before. It was an old commodity, an old product, but had not been produced in the same manner before. The object of the company, therefore, was to sell the old product at a lower price than the price at which it could be produced by the modes in use before this invention was [*464] patented, and *thereby to obtain business. That is the object. Being about to establish that company, and being about to buy the invention, they found the invention not in the exclusive hands of the inventor, but in the hands of himself and his assigns, persons who had acquired by purchase some portion of his patent rights.

Now nothing is better known than this, that when persons have turned their attention to a particular class of invention they are likely to go on and invent, and likely to continuously improve the nature of their invention, and continuously to discover new modes of attaining the end desired. Persons, therefore, who buy patents of inventors are in the habit of protecting themselves from the utter destruction of the value of the thing purchased by bargaining with the seller that he shall not use any new invention of his for producing that product in which they are about to deal at a

Printing and Numerical Registering Co. v. Sampson, L. R. 19 Eq. 464, 465.

cheaper rate, because if he were allowed to do so he might, the day after he had sold his patent, produce something which, without being technically an infringement, and without being technically an improvement, might accomplish the desired object in some other way, and utterly destroy the value of that which they had purchased. They, therefore, not unreasonably, and not unusually, make it a part of their bargain that whatever the man discovers of the same kind in the shape of machinery or apparatus which will produce the product in which they are about to deal shall belong to them. They say, "We cannot buy on any other terms, because otherwise we are exposed to the instantaneous, or almost instantaneous, competition of the inventor with the benefit of his previous experience." That, as I said before, is not an unusual, nor is it an unreasonable, bargain. Now the vendors in this case were of two classes. There were the class of inventor and the class of purchaser of inventions, and it is quite reasonable that there being the latter class in the market the purchasing body of persons should say to the vendors, "You shall not buy up any of these inventions to set up against me," otherwise the same evil might arise from purchase as from fresh invention; the vendors being in the trade, or undertaking the trade, or having turned their attention to the trade, might look out next day for a similar patent, for some patent, that is, which produced the same result, and start in trade against the purchaser. It is, therefore, not unreasonable to provide that the vendors shall not even buy any patent except * upon the terms that it shall belong [*465] to the purchaser. That is the position of the parties.

Now, it was said on the part of the defendant, that such a contract as that which I have mentioned, a contract by which an inventor agrees to sell what he may invent, or acquire a patent for before he has invented it, is against public policy, and it was said to be against public policy, because it would discourage inventions; that if a man knows that he cannot obtain any pecuniary benefit from his invention, having already received the price for it, he will not invent, or if he does invent will keep it secret, and will not take out a patent. It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have

Printing and Numerical Registering Co. v. Sampson. L. R. 19 Eq. 465, 466.

the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract. Now, there is no doubt public policy may say that a contract to commit a crime, or a contract to give a reward to another to commit a crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offence, or to give money or reward to another to commit an immoral offence, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further. I do not say there are no other cases to which it does apply; but I should be sorry to extend it much further. However, I am satisfied there is no reason for so extending it in this case. In the first place, it is assumed that a man will not invent without pecuniary reward. Experience shows us that that must not be taken as an absolute truth. Some of the greatest inventions, which have been of the most benefit to mankind, have been invented by persons who have given their inventions freely to the world. Again it is supposed that a man who has obtained money for the future products of his brain will not be ready to produce these products. That must not be assumed. Nothing is more common in intellectual [* 466] pursuits * than for men to sell beforehand the future intellectual product before it is made, or even conceived. Does any one imagine that it is against public policy for an artist to sell the picture which he has never painted or designed, or for the sculptor to sell the statue, the subject of which is to be hereafter given to him, or for the author to sell the copyright of the book, the title of which is even as yet unknown, or, more than that, that a contributor to a periodical may agree that he will devote himself to the exclusive service of a certain periodical for a given period, for a given reward? These examples are, to my mind, entirely repugnant to the argument that there is any public policy in prohibiting such contracts. On the contrary, public policy is the other way. It encourages the poor, needy, and struggling author or artist. It enables him to pursue his avocations, because people rely upon his honour and good faith, and the ordinary practice of mankind; and it will provide for him the means before-

hand which, if the law prohibited such a contract, he could not otherwise obtain. This appears to me to apply as much to a patent invention as to any other subject which the intellect can produce. A man who is a needy and struggling inventor may well agree either for a present payment in money down, or for an annual payment, to put his intellectual gifts at the service of a purchaser. I see, therefore, not only no rule of public policy against it, but a rule of public policy for it, because it may enable such a man in comparative ease and affluence to devote his attention to scientific research, whereas, if such a contract were prohibited he would be compelled to apply himself to some menial or mechanical or lower calling, in order to gain a livelihood. I think, therefore, if the question were to be debated solely on those considerations, such a contract as this could not be deemed against public policy, and I say that because this argument is one which is frequently used, and when it is brought forward deserves, as it has received from me on the present occasion, the most attentive consideration.

[His Honour then considered the remaining points, and made a decree for the plaintiffs.]

ENGLISH NOTES.

The principle that a contract is void, which is against public policy, has been dealt with under Nos. 31-41 of "Contract," 6 R. C. 325-455. The principle of the above rule is to be considered by way of contrast, and as limiting the scope of the principles illustrated by the cases Nos. 38-40 of "Contract" and notes 6 R. C. 392-455.

The principle of the decision of the MASTER OF THE ROLLS was cited and followed by CHITTY, J., in *Tullis v. Jackson*, 1892, 3 Ch. 441, 61 L. J. Ch. 655, 67 L. T. 340, 41 W. R. 11, where under an agreement between the parties to a building contract that "the certificates, &c. of the architect shall be final and binding, and shall not be set aside or attempted to be set aside on any ground, or for any reason, or for any pretence, suggestion, charge, or insinuation of fraud, collusion, or confederacy," it was held that it was competent and not contrary to public policy for the parties to agree that the question of fraud on the part of the arbitrator should not be raised; and that, in the absence of fraud on the part of either party, the question of fraud on the part of the arbitrator could not be raised.

 No. 1. — *Bassett v. Nosworthy.* — Rule.

AMERICAN NOTES.

The American cases dealing with contracts which are void on grounds of public policy are discussed in the American notes to Nos. 31-41 of "Contract," 6 R. C. 325-455.

Late decisions illustrating the principle are *Colusa v. Welch*, 122 California, 428; *Rakestraw v. Lanier*, 104 Georgia, 188; *Brady v. Yost*, 55 Pacific Rep. 542 (Idaho, 1898); *Crickfield v. Bermudez Asphalt Paving Co.*, 174 Illinois, 466; *Henderson v. Virden Coal Co.*, 78 Illinois App. 437; *Singer Mfg. Co. v. Ferrell*, 48 Southwestern Rep. 1078 (Ky. 1899); *Abmy v. Oruc*, 165 Massachusetts, 126; *Dickson v. Baker*, 77 Northwestern Rep. 820 (Minn. 1899); *McDonald v. Buckstaff*, 56 Nebraska, 88; *Specht v. Beindorf*, 56 Nebraska, 553; *Moloney v. Nelson*, 158 New York, 351; *Buel v. Baltimore & O. S. W. R. Co.*, 53 New York Supplement, 749; *Place v. Conklin*, 54 New York Supplement, 532; *Ralphsnyder v. Shaw*, 45 West Virginia, 680.

 PURCHASER FOR VALUE WITHOUT NOTICE.

[Arranged and annotated by W. F. Phillpotts, barrister-at-law.]

No. 1. — *BASSETT v. NOSWORTHY.*

(1673.)

No. 2. — *IND, COOPE & CO. v. EMMERSON.*

(1887.)

RULE.

THE defence of purchaser for value without notice may be sustained by any person who has given any valuable consideration sufficient to make him a purchaser within the 27 Eliz. c. 4, although it was not an adequate value of the interest purchased.

A purchaser who has paid his purchase-money without notice may lawfully after notice obtain the legal estate by purchase of an encumbrance, and if that would have been a protection against a plaintiff suing at law before the Judicature Act, 1873, it would have been, and still is, a good defence in equity.

No. 1. — **Bassett v. Nosworthy**, Rep. Temp. Finch, 102.

Formerly the plea might also have been maintained against a legal owner, claiming, in aid to his action at law, the auxiliary jurisdiction of the Court of Chancery, for discovery or other assistance which could not be granted at law.

But, under the modern practice where the same Court is competent, in one action, to grant all necessary relief, if a plaintiff claiming under a legal title applies to the Court for discovery or other relief auxiliary to his principal claim, the defendant cannot resist such an application on the ground that he is a purchaser for value without notice.

Bassett v. Nosworthy.

Rep. Temp. Finch, 102–104 (2 White & Tudor, L. C. 7th ed. 130).

Purchaser. — Bonâ Fide and without Notice. — Equity will not disarm.

Bill by the heir-at-law to discover a revocation of a will by his ancestor, under which the defendant claimed as a purchaser: and pleaded another bill brought in the Exchequer for the same matter, and after a full hearing dismissed, and the dismissal signed and enrolled; the plea was held good.

The plaintiff, Sir William Bassett, entitled himself, as son and heir of Elizabeth Seymour, who was the only daughter and heir of Sir Joseph Killigrew, who was brother and heir of Sir Henry Killigrew, whose estate the lands in the bill mentioned formerly were; the defendant's title being under a pretended purchase (as the plaintiff alleged) of these lands at Drury-house, and under the will of Sir Henry Killigrew, the purchase being from Jane Davis, afterwards the wife of Mr. Berkley, and from Henry Hill, the pretended natural son of the said Sir Henry Killigrew, of which will the plaintiff alleged there was a revocation by some subsequent deed or will; and for a discovery thereof, and what Mr. Nosworthy really paid for the purchase, and what deeds and writings he had, and to set aside the encumbrances which he had bought to protect his purchase, and that Mrs. Seymour might try her title at law upon the supposed revocation against the title of the defendant, as a purchaser under the said will, the now plaintiffs exhibited this bill:—

No. 1. — Bassett v. Nosworthy. Rep. Temp. Finch, 102, 103.

To which the defendant pleaded a dismissal of a bill in the Court of Exchequer signed and enrolled, which bill was there brought for the same matter as in this bill, and fully examined and dismissed upon a full hearing, but without prejudice, and the dismissal duly signed and enrolled: and he farther pleaded, that he was a purchaser for a valuable consideration, *bonâ fide*, paid without notice of any revocation.

This cause being heard by the Lord Keeper BRIDGMAN, he ordered precedents to be searched, where a plaintiff, after a dismissal of his bill on a judicial and formal hearing, and a full examination of witnesses in one Court of equity (and that without prejudice), had ever been admitted in another Court of equity to examine new witnesses to the same matter formerly in issue and examined.

[* 103] * And afterwards there being several orders made in this cause, and one by which the plea was overruled; and now the cause coming to be heard by the Lord Keeper NOTTINGHAM, who having read the articles for the defendant's purchase, and the conveyances, leases, fine, and recovery, which appeared to be made before any purchase at Drury-house, and having considered the whole matter, he was of opinion that the Court had gone much out of the way, and that the cause had been perplexed with several extraordinary orders, and not according to the usual course of proceedings: and therefore it was to be brought back to that state where it first went wrong.

Whereupon he discharged all former orders for examining witnesses at large, and confirmed all examinations to the matter of the defendant's plea, which, by the justice of a Court of equity, ought to conclude the plaintiff, unless he could disprove it; and a bill of the same nature having been brought in the Court of Exchequer, and there, after a full examination, dismissed, it seemed very hard that the dismissal was without prejudice, because no cross-bill can or ought to be received after publication, to examine the same witnesses again, for that might be a means to introduce subornation and perjury, even by the order of this Court, and no precedents can be found to warrant such practice.

Therefore the defendant having pleaded this dismissal in bar of any farther examination, and that he is a purchaser, *bonâ fide*, without notice of any revocation, and afterwards for the Court to save the benefit of this plea, by way of answer, and yet to allow

No. 1. — *Bassett v. Nosworthy*, Rep. Temp. Finch, 103, 104.

an examination to the whole matter, which had been pleaded in bar to such examination (all which had formerly been done in this cause), was in effect to surprise the defendant, and unawares to draw him off from that which was his most material defence.

The cause being then set right before the Court upon the true merits thereof, there were only two points which were considerable.

1. What the law of this Court is concerning purchasers.
2. Whether the defendant was a purchaser within that law.

As to the first point, a purchaser, *bonâ fide*, without notice of any defect in his title at the time of the purchase made, may lawfully buy in a statute or mortgage, or any other encumbrance; and if he can defend himself at law by any such encumbrances bought in, his adversary shall never be aided in a Court of equity by setting aside such encumbrances; for equity will not disarm a purchaser, but assist him; and precedents of this nature are very ancient and numerous (*viz.*), where the Court hath refused to give any assistance against a purchaser, either to an heir, or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another.

* And this rule, in a Court of equity, is agreeable to the [*104] wisdom of the common law, where the maxims which refer to descents, discontinuances, non-claims, and to collateral warranties, are only the wise arts and intentions of the law to protect the possession, and to strengthen the rights of purchasers.

2. As to the second point, the Court declared, that the defendant had sufficiently proved his plea, and himself to be a purchaser within the protection of this Court, because no fraud or circumvention appeared; and it was evident that the defendant had paid several great sums to discharge statutes which encumbered those lands, over and above what was paid to Mrs. Jane Berkley for her estate for life, and to Henry Hill for his reversion; and though the lands were proved to be of much greater value at this time, by the falling of several lives, than what they were at the time of the purchase, yet that will not alter the case in equity, because in purchases the question is not, whether the consideration be adequate, but whether 't is valuable; for if it be such a consideration as will make the defendant a purchaser within the statute 21 Eliz., and bring him within the protection of that law, he ought not to be impeached in equity.

No. 2. — *Ind, Coope & Co. and others v. Emmerson*, 12 App. Cas. 300, 301.

And since Henry Hill had nothing to subsist on during his minority but this reversion, and being a bastard could have no kindred by the law, and probably but few friends, there was some hazard of the money, which was advanced during his minority, if he died before the fine and recovery suffered.

Therefore the Court allowed the plea and dismissed the bill, and suppressed all the depositions taken in this cause before April last, and all since, but only such which relate to this plea of the defendant.

Ind, Coope & Co. and others v. Emmerson.

12 App. Cas. 300-312 (s. c. 56 L. J. Ch. 989; 56 L. T. 778; 36 W. R. 243).

[300] *Action for Recovery of Land. — Discovery. — Title Deeds. — Purchaser for Value without Notice.*

An action having been brought in the Chancery Division to recover possession of land and claiming production and delivery of documents alleged to be material to the plaintiff's title, the defendants pleaded that they were purchasers for valuable consideration without notice, and on this ground objected to the discovery and production of certain documents of title: —

Held, affirming the decision of the Court of Appeal (33 Ch. D. 323), that the objection was invalid for the following reason: —

Before the Judicature Act, 1873, a plea of purchase for valuable consideration without notice was not available against either discovery or relief claimed in those cases in which the Court of Chancery had concurrent jurisdiction with the Common Law Courts upon legal titles. Sect. 21, sub-sect. 2, of the Act of 1873, therefore, gives no protection to the defendants, the Court having now complete jurisdiction over the whole action.

The respondent having brought an action to recover possession of certain lands and having also claimed by her statement of claim production and delivery of certain papers, deeds, and documents, which she alleged to be material to her title, the appellants by their defence alleged that they were in possession, and, further,

that they were purchasers for valuable consideration without [*301] out *notice. The usual order for an affidavit of documents having been made against the defendants, they made an affidavit that with regard to the whole of certain documents of title admitted to be in their possession they were purchasers for valuable consideration without notice, and that some of such documents did not prove or tend to prove the plaintiff's case. The plaintiff having taken out a summons for production of

No. 2. — *Ind, Coope & Co. and others v. Emmerson*, 12 App. Cas. 301, 302.

these documents, CHITTY, J., dismissed the summons. On appeal the Court of Appeal (COTTON, LINDLEY, and LOPES, L.JJ.) discharged the order of CHITTY, J., except as to documents which the defendants swore did not prove or tend to prove the plaintiff's title.¹

From this order the present appeal was brought.

March 31, April 1. Sir H. Davey, Q.C., and Haldane, for the appellants:—

The plea that the defendant is a purchaser for valuable consideration without notice can be set up as an equitable defence to the claim and proceedings for discovery in this action by virtue of sect. 24, sub-sect. 2, of the Judicature Act, 1873. Before that Act such a plea would have been a good equitable defence to a bill for discovery only, and under the present rules the right of discovery is not in principle more extensive than it formerly was in the Court of Chancery; the right to discovery is regulated by the rules previously existing in the Court of Chancery. *Anderson v. Bank of British Columbia*, 2 Ch. D. 644; *Kearsley v. Phillips*, 10 Q. B. D. 465. As against such a purchaser there is no power to order discovery in aid of proceedings to establish a legal title in cases where the jurisdiction of the Court of Chancery as regards the legal relief claimed would have been before the Judicature Act auxiliary only, as distinguished from concurrent. The principle on which the Court of Chancery treated such a plea appears from many cases: *e. g.*, *Wallwyn v. Lee*, 9 Ves. 24, 32 (7 R. R. 142); *Colyer v. Finch*, 5 H. L. C. 905, 921; *Heath v. Crealock*, L. R. 15 Eq. 257, 18 Eq. 218; *Jerrard v. Saunders*, 2 Ves. Jr. 454; *Pennington v. Beechey*, 2 S. & S. 282; see * also [* 302] *Harrison v. Southcote*, 1 Atk. 534. In *Phillips v. Phillips*, 4 D. F. & J. 208, 217, Lord WESTBURY no doubt cited two cases relied on by the present respondent, *Williams v. Lamb*, 3 Bro. C. C. 264, and *Collins v. Archer*, 1 Russ. & My. 284, but those cases were doubted by Lord ST. LEONARDS, *Vendors and Purchasers*, 14th ed. 1862, pp. 792, 3.

[Lord HERSCHELL referred to the discussion of those cases in 1 Story Eq. Jur. 12th ed. 410, n. 3.]

The distinction relied on by the respondent in cases where the Court of Equity had concurrent jurisdiction must be considered as

¹ 33 Ch. D. 323, where the pleadings are more fully set out than is necessary for the present report.

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at the least very doubtful. In Wigram on Discovery, 2nd ed. pp. 81, 82, there is an expression of opinion adverse to the appellants, but the cases cited in support of the opinion, *Ovey v. Leighton*, 2 S. & S. 234, and *Earl of Portarlington v. Soulby*, 7 Sim. 28, do not support it. They admit the general doctrine that such a plea is good, and only affect the question of the mode of raising the defence. The general doctrine was also admitted by a common law Court in *Gouge v. Parrott*, 3 C. B. (N. S.) 47. A plaintiff in ejectment at common law had no right to discovery under the Common Law Procedure Act, 1854. *Horton v. Bott*, 2 H. & N. 249. The result of the authorities is, that before the Judicature Act, 1873, there was no power at law to give a plaintiff in ejectment discovery of documents; nor in equity if this plea was pleaded. A plaintiff in ejectment had two rights: one a legal right in an action at law: the other an equitable right to discovery to be pursued in the Court of Chancery, and against this right all equitable defences were available. The Judicature Act, 1873, made no change in this latter respect. Sect. 24, sub-sect. 2, expressly preserves the right of equitable defence in cases like the present. The present is not to be regarded as a suit in equity. It is really an action at law and a bill for discovery rolled into one.

April 21. Whitehorne, Q. C., and Rigby, Q. C. (E. Ford with them), for the respondent:—

There is no recorded case where the Court of Chancery [* 303] refused * relief against a purchaser for value without notice when complete relief was asked, as distinguished from auxiliary. Where the Court had to declare the right the defence of purchase for value without notice was of no avail. *Newton v. Newton*, L. R. 4 Ch. 143, distinguishing *Wallwyn v. Lee*, 9 Ves. 24 (7 R. R. 142); and see *Greenslade v. Dare*, 17 Beav. 502; *Stackhouse v. Countess of Jersey*, 1 J. & H. 721; and Wigram on Discovery, 2nd ed. pp. 67, 81.

In *Williams v. Lambe*, 3 Bro. C. C. 264, the plea was held not good against a bill for dower; and in *Collins v. Archer*, 1 Russ. & My. 284, it was held of no avail against a plaintiff who relies upon a legal title. These two cases conclusively establish the proposition that the defence was no defence, either against discovery or relief where the Court of Equity had concurrent jurisdiction with the common law Courts: and see *Phillips v. Phillips*,

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per Lord WESTBURY (4 D. F. & J. 208, 217^a); and *Lyell v. Kennedy*, per Lord SELBORNE (8 App. Cas. 217, 226). The defendants do not, therefore, bring themselves within sect. 24, sub-sect. 2, of the Judicature Act, 1873. The present is not a proceeding for auxiliary relief. But even if it were, relief may be granted against a purchaser for value without notice. *Manners v. Meer*, 29 Ch. D. 725, 732.

The defence, as pleaded, does not amount to such a plea as would have been allowed under the old practice. The true form of plea must be carefully observed. See Beames on Pleas, Appendix, p. 341, setting out the plea in *Wallwyn v. Lee*.

Sir H. Davey, Q. C., replied.

The House took time for consideration.

May 20. EARL OF SELBORNE:—

My Lords, by Order XXXI. of the Supreme Court, the rules laid down as to discovery are, that interrogatories may be delivered for the examination of defendant by plaintiff, or plaintiff by defendant, “in every cause or matter” (except cases of alleged fraud or breach of trust, in which they are to be of right) by leave *of the Court or Judge; and that if interrogatories are [* 304] delivered, any objection to answering any one or more of them, on any ground (*i. e.*, some ground legally admissible), may be taken by the affidavit in answer: and that any party may apply to the Court or a Judge for an order directing any other party “to any cause or matter,” to make discovery on oath of documents; the party against whom any such order is made being at liberty to object (specifying the grounds of his objection) to the production of any particular documents; and it being for the Court or a Judge to decide on the validity of any such objection, if taken.

So far as this order goes, the rules as to discovery are general, and apply equally (with the exception mentioned) to all causes and matters. But it is left open to the party required to make discovery, in every cause or matter, to object to any particular discovery on any ground which he may think tenable; and it is for the Court or a Judge to decide whether such ground is tenable or not.

I assume, for the purpose of the present question, that a party to whom interrogatories have been delivered by leave of the Court or a Judge, may by affidavit in answer object to answer all or any

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part of them, not only on any special ground of objection to particular discovery, but also on the general ground, that he is privileged, by the position in which he stands, against giving any discovery at all in a suit such as that brought against him. It may be that if such a privilege could be shown to be well founded in law, he would have that right; though I do not think it necessary now to decide that question. The question to be now decided is whether every defendant, who under the old practice in Chancery might have successfully pleaded, to a bill for discovery in aid of an action at law, that he was a purchaser for valuable consideration without notice, has, under the present law of the High Court of Justice, a privilege of absolute exemption from the obligation to make discovery? The Court of Appeal has held the contrary; and with that opinion I agree.

The argument for the appellants has been, that under sect. 24 (sub-sect. 2) of the Judicature Act of 1873, the Court, and every Judge is bound to give to "every equitable defence" properly

alleged, "such and the same effect by way of defence [* 305] against * the claim of the plaintiff or petitioner as the

Court of Chancery ought to have given, if the same or the like matter had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose, before the passing of the Act." It was contended, that in the Court of Chancery, before the passing of the Act of 1873, a plea of purchase for valuable consideration without notice would have been a good equitable defence to a bill for discovery only; and, therefore, that it is now a good equitable defence against discovery in the present action, which is (in effect) an action of ejectment brought by the plaintiff upon an (alleged) legal title; or, at all events, against the production of those deeds and documents, of which production and delivery are expressly asked by the plaintiff's amended statement of claim, and which she therein alleges to be necessary to establish her title.

I will consider, first, the question as to the right to discovery generally; and afterwards, that as to the discovery of the deeds and documents of title.

The first observation to be made is, that the Court of Chancery, when it allowed a plea of purchase for valuable consideration without notice to a bill for discovery only, allowed it, not to particular discovery (as, *e. g.*, of certain deeds and documents), but

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to the whole; not on the ground that certain things ought not to be inquired into, but because the Court ought not, as against such a purchaser, to give any assistance whatever to a plaintiff suing upon a legal title in another jurisdiction. And, upon the same ground, a like plea would have been allowed to a suit asking for more than discovery (*c. g.*, for an injunction to restrain the defendant at law from setting up outstanding terms), when the object of the suit was still to obtain from the Court of Chancery assistance to the suit of the plaintiff, suing upon a legal title in another jurisdiction. The defence was, in effect, "no equity," which is a different thing from an "equitable defence." It was thought inequitable, generally, that a man should defeat a legal title by keeping back facts in his own knowledge, or by setting up outstanding terms; it was thought not inequitable that a purchaser for value without notice should use any such *tabula in naufragio*, as best he could. But in the present case there is no *suit in any other jurisdiction; the High Court of Justice [* 306] is asked, and is competently asked, to exercise a principal, and not an auxiliary jurisdiction, and to give effect to the legal title, which the plaintiff alleges to be in herself. If a like suit had formerly been brought in the Court of Chancery it would have been demurrable; not because there was an equitable defence, but because the title was legal, and the plaintiff stated no equity. To abolish that division of jurisdictions was the very object of the Judicature Act. As against "the claim" of the plaintiff, in this suit, it is not, and it cannot be, pretended, that purchase for valuable consideration is a good equitable defence. Why, then, should it be an equitable defence against the discovery which is sought only as incident to, and as evidence in support of, the claim? In the class of cases referred to, the separation and division of jurisdictions between the Courts of equity and the Courts of common law was the real and only ground on which such a defence was admitted. As against an innocent purchaser, sued at law, the Court of Chancery (having no jurisdiction itself to try the title) found no equity requiring it to give assistance to a proceeding brought elsewhere for that purpose. But it is impossible, without departing from that ground, to make the same defence available against discovery (otherwise proper) in a suit in which it is not available against the relief, and in which the High Court has proper jurisdiction to try, and must try and determine, the ques-

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tion of title. And, accordingly, we find that there is no instance of any suit competently brought in the Court of Chancery, for relief as well as discovery, in which the defence of purchaser for value without notice has been held available against discovery incident to the relief, and not against the relief itself also. That defence was never admitted as an objection to particular discovery; it went to all or none. And in those cases, in which the Court of Chancery had concurrent jurisdiction with the common law Courts upon legal titles, it was not available against either discovery or relief. *Williams v. Lambe*, 3 Bro. C. C. 264; *Collins v. Archer*, 1 Russ. & My. 292; *Phillips v. Phillips*, 4 D. F. & J. 217.

In the words, therefore, of that section of the Judicature Act on * which the appellants' reliance was placed, this would not, before 1873, have been a good equitable defence to discovery in the Court of Chancery "in any suit or proceeding instituted in that Court for the like purpose."

With respect to the deeds and documents of title, the appellants would be privileged against their production, if they could say on oath that they related solely to their own title, and did not in any way tend to prove or to support the title of the plaintiff. But the present question relates to deeds and documents, as to which they have not made (and I presume cannot make) any such averment. To the discovery of such deeds and documents, as evidence to be used at the trial in support of the plaintiff's case, no principle or authority is, in my judgment, opposed. The case of *Wallerga v. Lee*, 9 Ves. 24 (7 R. R. 142), before Lord ELLON, was that of a plea (which was allowed) to relief as well as discovery; and that of *Joyce v. De Molegas*, 2 Jon. & Lat. 374, before Lord ST. LEONARDS, was also one in which the defence (which prevailed) was to the whole suit.

I am, therefore, of opinion that the order appealed from is right, and that this appeal ought to be dismissed with costs.

Lord WATSON: —

My Lords, until the Judicature Act of 1873 came into operation, the plaintiff in an ordinary action of ejectment could not obtain discovery from his opponent, except by an application to the Court of Chancery, which had no jurisdiction in regard to the subject-matter of the suit. It was the general practice of the

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Court to aid the litigant, who thus applied to it, by giving discovery; but an exception was made when the defendant in ejectment had in *bonâ fide* purchased and paid for the property forming the subject of the litigation without notice of the plaintiff's right. In that case the Court declined to exercise its auxiliary jurisdiction, upon the ground that there was no equity requiring it to interfere and deprive the purchaser of what was termed his *tabula in naufragio*. On the other hand, the authorities which were referred to in the course of the argument appear to me

* to establish that in cases where the plaintiff applied [* 308] to the Court of Chancery for complete relief, which its jurisdiction enabled the Court to give, the Court did not hesitate to deprive the defendant, although a purchaser for value and without notice, of the advantage which, in the exercise of its auxiliary jurisdiction, it permitted him to retain.

I think it is impossible to affirm that a Court of equity ought always to give to a litigant who is suing before another tribunal the same assistance to which he would have been justly entitled if the principal action had depended before itself. However that may be, the decision of this appeal appears to me to depend upon the practice as settled, and not upon the sufficiency or insufficiency of the considerations which led to its adoption.

The main object of the Judicature Act was to enable the parties to a suit to obtain in that suit and without the necessity of resorting to another Court, all remedies to which they are entitled in respect of any legal or equitable claim or defence properly advanced by them, so as to avoid a multiplicity of legal proceedings. In pursuance of that object, the Act has given to both sides of the High Court the same jurisdiction in suits for the recovery of land which previously belonged to the Courts of law; and also (subject of course to its provisions) the same jurisdiction to grant discovery, for the purposes of these suits, which had belonged exclusively to the Court of Chancery. Auxiliary proceedings, with a view to discovery, in a Court other than that before which the principal suit depends, are inconsistent with its provisions, and are no longer competent.

The present suit, which is for possession of land, and is in substance an action of ejectment, was instituted in the Chancery Division, and it might, with equal competency, have been brought before the other side of the High Court. The plaintiff has applied

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for discovery, against which the defendants have stated the plea that they are purchasers for value, without notice of her title. I am not satisfied that, if otherwise available, the plea would have been prejudiced by the alteration in the form of pleadings which the Judicature Act has introduced. Whether it is still available to the defendants, depends upon the construction of sect.

24, sub-sect. 2, which deals expressly with the effect [* 309] * to be given to equitable defences by the new Courts constituted under the provisions of the Act.

The Act of 1873 deals with the remedies and not with the rights of parties litigant. It was not intended to affect, and does not affect, the quality of the rights and claims which they bring into Court, and submit to the judgment of the Court, whether as plaintiffs or as defendants. But it does not follow that its provisions cannot affect the substance as well as the form of the procedure by means of which these rights are to be ascertained and enforced. Discovery is matter of remedy, and not matter of right. If an Act had been passed by the Legislature which simply transferred jurisdiction in ejectment suits to the Court of Chancery, that would have been a statute altering, not the rights of parties, but the tribunal before which their remedy was to be sought; yet it does not seem to me to be doubtful that its effect would have been to deprive the defendant, who was a purchaser for value and without notice, of the benefit of the plea, founded on these circumstances, which he could have urged successfully in a mere auxiliary proceeding.

Sect. 24, sub-sect. 2, enacts that the new Courts shall give to every "equitable defence" the same effect which the old Court of Chancery ought to have given "if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act." Assuming the plea in question to be an "equitable defence," within the meaning of the sub-section, is an application for discovery, made in the principal cause to the Judge before whom it depends, to be regarded as a suit or proceeding instituted for the same or the like purpose, with an application made to the old Court of Chancery in aid of an action of ejectment depending before a Court of common law? In my opinion, that question must be answered in the negative. Before the Act of 1873 the Court of Chancery observed a distinction between an

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incidental application, *in causâ*, to a Court competent to give full equitable relief, and an application for discovery to another Court. Although in an auxiliary application the Court of Chancery declined to interfere with a *bonâ fide* purchaser for value, yet it appears to me to have invariably acted * upon the [* 310] principle that a Court which had jurisdiction, not only to give relief to the plaintiff, but to enforce the equitable claim of the defendant, was bound by equitable considerations to grant discovery. That is, in my opinion, the rule which ought to be followed in considering whether the plea advanced by the appellants in this case should be sustained; and I have accordingly come to the conclusion that the order of the Court of Appeal must be affirmed.

LORD FITZGERALD: —

My Lords, I entirely concur. I adopt the judgment of the noble Earl and the conclusion at which he has arrived, and also the judgment of my noble and learned friend opposite (LORD WATSON).

LORD HERSCHELL: —

My Lords, I have arrived at the same conclusion. I think the appellants have established that prior to the Judicature Act the plaintiff in this action could not have compelled the defendants to make the discovery which she seeks either in a Court of law or equity. And it seems, at first sight, strange that by reason of a change of procedure the object of which was not, except in certain specified cases, to alter rights, but only to enable every Division of the High Court to administer both law and equity, and to afford all the relief to which the parties were entitled, it should be possible to obtain discovery when it could not previously have been had either at law or in equity. But I think the explanation is to be found in the fact that the right of a purchaser for value to exemption in equity from the obligation to make discovery had its origin in and was founded upon that separation of jurisdiction which it was the object of the Judicature Act to abolish. Where a plaintiff suing at law on his legal title sought the assistance of a Court of equity to procure discovery, that aid was denied when the defendant was a purchaser for value. To a bill filed praying discovery, the plea that the defendant was a purchaser for value

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without notice was a complete answer. And it was an [* 311] answer, too, in all cases in which the auxiliary jurisdiction of the Court of Equity was appealed to in furtherance of an action. But I think it was well settled, at the time the Judicature Act was passed, that it was only where discovery was thus sought as auxiliary to an action that it could be successfully resisted by a purchaser for value. If the Court of Equity had concurrent jurisdiction and a plaintiff sought to enforce his legal title there, as, for example, in a case of dower, the Court compelled discovery, even by a purchaser for value, as ancillary to the principal relief sought by the suit. No case was cited at the bar in which discovery ancillary to other relief had been refused by the Court.

Under the existing system it is not necessary to apply to one branch of the Court as auxiliary to another. And there is no longer any need of praying for discovery in the statement of claim which is substituted for a bill. The plaintiff in every action is entitled to discovery as ancillary to the relief which he claims in the action.

It is contended that the right to resist discovery is preserved to a purchaser for value, because by sect. 24, sub-sect. 2, of the Judicature Act the Court is bound to give to every equitable defence such and the same effect by way of defence against the plaintiff as the Court of Chancery ought to have given if the same or the like matter had been relied on by way of defence in any suit instituted in that Court for the same or the like purpose before the passing of the Act.

I think it may fairly be said that the allegation that the defendant was a purchaser for value was an equitable defence. For the matter which was a bar to the suit did not appear on the face of the bill and needed to be set up by plea. But it was not an equitable defence unless the bill sought discovery only to assist a plaintiff who was pursuing his remedy elsewhere. I therefore am of opinion that the present action in which the plaintiff seeks to recover possession of land to which she alleges a legal title, and applies for discovery as ancillary thereto, is not an action instituted for the same or a like purpose as that in which a plea of purchase for valuable consideration could have been relied on as an equitable defence.

I cannot profess to be satisfied with the reasoning which

led * the Court of Chancery to deny its ordinary assist- [* 312]
ance to a plaintiff who was suing a purchaser for value at
law and to afford the very same kind of assistance to a plaintiff
who, having a choice of either jurisdiction, selected the Court of
Chancery as the tribunal to enforce a legal right. But I am satis-
fied that the distinction existed, and that it was only in the
former case that discovery could be resisted.

Every plaintiff is now *primâ facie* entitled to discovery in any
action, and I can find nothing either in the Act or in the rules to
warrant us in depriving the present plaintiff of the right thus
conferred.

I accordingly concur in thinking that this appeal must be
dismissed.

Order appealed from affirmed, and appeal dismissed with costs.
Lords' Journals, 20th May, 1887.

ENGLISH NOTES.

For a full discussion of the rule in *Bassett v. Nosworthy*, see 2 White
& Tudor's L. C. Equity ed. 8, p. 153.

As to the word "purchaser," Lord BATHURST in *Bullock v. Sad-
ler* (1776), Ambler, 767, approves of the LORD KEEPER's judgment in
Bassett v. Nosworthy, and says, "The question is not whether the con-
sideration is adequate, but whether it is valuable, for if it be such a
consideration as will not be deemed fraudulent within the statute of
Elizabeth (27 Eliz. c. 4), or he is such a purchaser as would hinder
a puisne purchaser from overturning it, he ought not to be impeached
in equity." The words in the statute of 27 Eliz. are purchase for
money or any "good" consideration. "good" means "valuable,"
but not necessarily "pecuniary." See *Price v. Jenkins* (1877), 5 Ch.
D. 619, 46 L. J. Ch. 805, 77 L. T. 52; but see as to the word "pur-
chaser" in the Bankruptcy Acts of 1869 & 1883, *Ex parte Hillman*
(1878), 10 Ch. D. 622, 48 L. J. Bk. 77, 40 L. T. 177, 27 W. R. 507,
Hance v. Harding, 20 Q. B. D. 732, 57 L. J. Q. B. 403, 59 L. T. 659,
36 W. R. 629, and *Mackintosh v. Pogose* (1895), 1 Ch. 505, 64 L. J.
Ch. 274, 72 L. T. 251, 43 W. R. 247.

The rule that an assignee of a chose in action takes subject to all
equities affecting it in the hands of the assignor, overrides the rule that
a purchaser without notice taking the legal estate is protected by it.
Thus, if a legal mortgage is transferred without the privity of the
mortgagor, the transferee takes subject to the state of account between
the mortgagor and transferor. *Matthews v. Walwyn*, 4 Ves. 118, and

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subsequent payments of capital and interest to the transferor before notice to the mortgagor will be allowed against the transferee. *Williams v. Sorrell*, 1 Ves. 389; *Norrish v. Marshall*, 5 Madd. 475; *Allen v. Lord Southampton*, 16 Ch. D. 178, 29 W. R. 231. Unless the mortgagor is affected by notice or collusion. *Dixon v. Winch* (1900), 17 W. R. 620, 81 L. T. 111, 68 L. J. Ch. 572, affirmed by C. A. (1900). 41 Sol. J. p. 327. The cases relating to purchasers for value without notice are most frequent in the case of land, but the doctrine applies to personal estate as well as land; see the cases of *Thorndike v. Hunt* (1859), 3 De G. & J. 563, 28 L. J. Ch. 417, 5 Jur. (N. S.) 879, 7 W. R. 246; and *Taylor v. Blakelock* (1885), 32 Ch. D. 560, 56 L. J. Ch. 390, 55 L. T. 8, 34 W. R. 175, which related to personal estate in settlement. See also *Dawson v. Prince* (1857), 2 De G. & J. 41, 27 L. J. Ch. 169, 4 Jur. (N. S.) 497, 6 W. R. 171, a case relating to a negotiable instrument, which stands on a different footing from other property; but the judgment of TURNER, L. J., lays down that the principle of purchases for value without notice does not depend on the nature of the property.

In *Calisher v. Forbes* (1871), L. R. 7 Ch. 109, 41 L. J. Ch. 56, 25 L. T. 772, 20 W. R. 160, a case relating to charges on the proceeds of sale of an officer's commission of different dates, all of which were before the proceeds came into the agent's hands, the Court held that all the notices were contemporaneous, and allowed the holder of the first charge in point of date, which extended to further advance, to tack an advance subsequent in date to the other charges but made without notice of them.

But as the doctrine of notice to the legal holder or trustee of the assignment of a chose in action or trust fund in giving priority does not apply to assignments of shares in limited companies. See per Lord SELBORNE in *Société Générale, &c. v. Walker* (H. L. 1885), 11 App. Cas. 20, 55 L. J. Q. B. 169, 54 L. T. 389, 34 W. R. 662, the question whether in the case of a purchase of shares a purchaser has obtained the legal estate without notice frequently arises; see the case of *Société Générale, &c. v. Walker* (1885), (*supra*): *Colonial Bank v. Heparorth* (1887), 36 Ch. D. 36, see p. 54, 56 L. J. Ch. 1089, 57 L. T. 148, 36 W. R. 259; *Moore v. North Western Bank*, 1891, 2 Ch. 599, 60 L. J. Ch. 627, 64 L. T. 456, 40 W. R. 93.

The decision in *Basset v. Nosworthy* was on an application by a legal owner suing at law to the Court of Chancery for assistance under the auxiliary jurisdiction which has been abolished by the Judicature Act; but the decision was not founded on that, but on the rule that the Court of Chancery would not take from a purchaser for value without notice any legal estate which would have been a protection at law.

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And this so far as regards a purchaser who has a legal estate is still a rule in all Courts, notwithstanding the Judicature Act of 1873, subject to the qualifications noticed in the notes to *Pilcher v. Rawlins* (p. 729, *post*).

The judgments in *Bassett v. Nosworthy* and other old cases, however, lay down the rule that the Court of Chancery would not give any assistance against a purchaser for value without notice in terms so wide that they would seem to imply that the plea might be used as a shield in all cases by owners of equitable estates.

The decision in *Ind, Coope & Co. v. Emmerson* (*supra*), following in this respect the judgment of Lord WESTBURY in the case of *Phillips v. Phillips* (1861), 4 De G. F. & J. 208, 217, shows that the doctrine, as broadly stated, was, before the Judicature Act, only applicable to a plea by an equitable owner in certain instances of the various jurisdictions then exercised by the Court of Chancery.

Before the Judicature Act of 1873 the jurisdiction of the Court of Chancery was divided into cases where that Court had "exclusive, concurrent, or auxiliary jurisdiction."

The exclusive jurisdiction was involved where only equitable interests were in question, as in administration of trusts, or determining some equitable right, as in foreclosure.

As regards the plea of purchaser for value without notice in applications to the exclusive jurisdiction of the Court of Chancery, it was decided by Lord WESTBURY in *Phillips v. Phillips* (1861), 4 De G. F. & J. 208, that when it was necessary to determine priorities between equitable encumbrances or equitable estates, none of them having a legal estate, the plea of purchaser for value without notice by the defendant owner of an equitable estate did not prevent the Court of Chancery from deciding in the priorities or giving complete relief. See also as to this the judgment of FRY, J., in *Cave v. Cave* (1880), 15 Ch. D. 639, see p. 646, 49 L. J. Ch. 505, 42 L. T. 730, 28 W. R. 793. So in cases of foreclosure the Court would declare priorities and grant foreclosure. The Court would, however, only go so far against a mortgagee or other purchaser for value without notice as was necessary to give the equitable remedy. See the cases noted *infra*, in which a sale was refused; but there foreclosure stood on a peculiar footing. See per Lord CRANWORTH, *Colyer v. Finch* (1854), 5 H. L. C. 905, 26 L. J. Ch. 65, 3 Jur. (N. S.) 25. Lord WESTBURY also recognises one case in which the plea would be held good in the case of exclusive jurisdiction where the application was to enforce an equity instead of an equitable estate.

As Regards the Auxiliary and Concurrent Jurisdiction. — While law and equity were distinct, the Court of Chancery could not give re-

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relief to a person claiming under a simple legal title, except such assistance as ordering discovery under the auxiliary jurisdiction in aid of an action at law on a legal title; this was a case of auxiliary jurisdiction.

It had, however, been long established that the Court of Chancery had jurisdiction to give complete relief in certain cases where there was a legal title, but the remedy at law was inadequate; *e. g.* such cases as applications for an account even in the case of a legal title to land as a share of a colliery. *Story v. Windsor* (1743), 2 Atk. 630. See the origin of the jurisdiction explained in *Corporation of Carlisle v. Wilson* (1807), 12 Ves. 276. or partition, Mitford on Pleading, 120; so also in the case of a bill for dower, *Williams v. Lambe* (1791), 3 Bro. C. C. 304; or for tithes, *Collins v. Archer* (1834), 1 Russ. & My. 284, 32 R. R. 214.

These were distinguished as cases in which the Court of Chancery was said to have concurrent jurisdiction with Courts of law.

The judgments in *Ind, Coope & Co. v. Emmerson* do not deal with the plea of purchaser for value on application to the exclusive jurisdiction of the Court of Chancery, except incidentally where Lord SELBORNE says: "We find that there is no instance of any suit competently brought in the Court of Chancery for relief as well as discovery, in which the defence of purchaser for value without notice has been held available against discovery as incident to the relief and not against the relief itself also." The judgments in *Ind, Coope & Co. v. Emmerson*, however, deal with the plea in cases of both the concurrent and auxiliary jurisdiction. It had, in 1862, been laid down by Lord WESTBURY in the case of *Phillips v. Phillips (supra)*, that before the Judicature Act of 1873 a plea of purchaser for value without notice was not available against either discovery or relief claimed by a legal owner in these cases in which the Court of Chancery had concurrent jurisdiction with the common law Courts upon legal titles, but there appeared to be so much authority to the contrary that a decision of the House of Lords was required to make this clear. See the cases discussed by Lord ST. LEONARDS in Sugden, V. & P. 13th ed. pp. 182 to 198, and see the opinion of Lord REBESDALE, Mitford on Pleading, p. 275, and of Lord HARDWICKE in *Story v. Windsor* (1743), 2 Atk. 630, where he laid down that the plea of purchaser for value without notice if proved would have been available in a case which was one of concurrent jurisdiction, as it was a suit by a legal owner of a share in a colliery, suing in equity because an account of profits was required.

The judgment in *Ind, Coope & Co. v. Emmerson* established not only (1) that before the Judicature Act of 1873 a plea of purchaser for valuable consideration without notice was not available against either discovery or relief claimed by a legal owner in these cases in which

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the Court of Chancery had concurrent jurisdiction with the common law Courts upon legal title; but (2) that it was before the Judicature Act, 1873, available against a legal owner applying to the auxiliary jurisdiction of Chancery; and (3) the judgments further established that in these applications to the auxiliary jurisdiction it was not saved as an equitable defence within the meaning of these words in sect. 24, sub-sect. 3, of the Judicature Act, 1873, because whether strictly speaking an equitable defence or not, in which Lord SELBORNE and Lord HERSHELL were not apparently agreed, it was not available as an equitable defence in any case where the Court of Chancery had jurisdiction to give complete relief, and all Courts now had concurrent jurisdiction. The most common case of the auxiliary jurisdiction was an application by the legal owner suing at law to the Court of Chancery for discovery or delivery of title deeds.

As regards discovery before the Judicature Act of 1873, the Legislature had attempted to assimilate the practice of the Courts. The Common Law Procedure Act of 1854 by sect. 51 enacted that in all cases by order of the Court or a Judge interrogatories might be delivered.

In the case of *Horton v. Bott* (1857), 2 H. & N. 249, 26 L. J. Ex. 267, it was decided in effect, see per JESSEL, M. R., in *Lyell v. Kennedy* (1882), 20 Ch. D. 488, that the new procedure was a mere substitute for the old procedure in equity, and that if a right to discovery did not exist in equity before that Act, it was not conferred by that Act.

Then came the Judicature Act of 1873, which gave to every branch of the High Court jurisdiction in legal and equitable titles, but by sect. 25, sub-sect. 6, preserved equitable defences, and by sub-sect. 11 provided that in cases of variance between the rules of equity and of common law the rules of equity should prevail.

In *Lyell v. Kennedy* (1883), 8 App. Cas. 217, 52 L. J. Ch. 385, 48 L. T. 585, 31 W. R. 618, it had been decided that either before or since the Judicature Act there was no general rule in equity that a plaintiff suing on a legal title had not a right to discovery, but in that case the plea of purchaser for value without notice was not raised.

The ruling case of *Ind. Coope v. Emmerson* decided that before the Judicature Act of 1873, a purchaser for value without notice could have made this a good defence to an application for discovery by a legal owner suing on a legal title to land at law, but that this was merely because the Court of Chancery would not exercise its auxiliary jurisdiction against a purchaser for value without notice, and that as auxiliary jurisdiction had ceased to exist, a plea which depended on this had also ceased to have any effect.

In the cases of *Wallwyn v. Lee* (1803), 9 Ves. 24, 7 R. R. 142, and *Joyce v. De Moleyns* (1845), 2 Jo. & Lat. 374, 8 Ir. Eq. Rep. p. 215.

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delivery of title deed was refused as against a purchaser for value without notice. Lord WESTBURY, in *Phillips v. Phillips* (*supra*), refers to these cases as being instances of an application to the auxiliary jurisdiction. In actions for foreclosure, however, before the Judicature Act, it was the practice of the Court to refuse to order delivery of title deeds against a purchaser for value without notice. And foreclosure was an instance of exclusive and not of the auxiliary jurisdiction.

In *Hunt v. Elmes* (1860), 2 De G. F. & J. 578, 30 L. J. Ch. 255, 7 Jur. (N. S.) 200, 3 L. T. 796, 9 W. R. 362, it was decided that in a foreclosure action the Court would not order a purchaser without notice to give up deeds.

In *Heath v. Crealock* (1874), L. R. 10 Ch. 22, 44 L. J. Ch. 157, 31 L. T. 650, affirming with variations the judgment of BACON, V.-C., L. R. 18 Eq. 215, 23 W. R. 95, the LORD CHANCELLOR, Lord CAIRNS, and the LORDS JUSTICES, referring to *Hunt v. Elmes*, treated it as clear that in a decree for foreclosure title deeds would not be taken from a purchaser for value without notice. Lord CAIRNS said that it was not the practice of a Court of equity to take anything away from a purchaser for valuable consideration, of that which he has bought and holds, and that as the Court “is not in the habit of ordering a sale unless it can go on and complete the sale, in every necessary way giving possession and insuring that the title deeds shall be handed over.” For this reason the Court should decree foreclosure instead of sale.

In both these cases the bill was filed before the Judicature Act of 1873 came in force.

In re Cooper, *Cooper v. Vesey* (1882), 20 Ch. D. 611, 51 L. J. Ch. 862, 47 L. T. 89, 30 W. R. 648, the Court of Appeal held that since the Judicature Act of 1873 the Court has power to order delivery of title deeds to a legal owner by a purchaser for value without notice. This was not an action for foreclosure. In this case the purchaser took title under forged deeds, executed in fact by a trustee and beneficiary under a will, but purporting to be the deeds of his father, the testator, and the Court declared that the trustees of the will were entitled to delivery of them by the purchaser.

In *Manners v. Mew* (1885), 29 Ch. D. 725, 54 L. J. Ch. 909, 53 L. T. 84, NORTH, J., held that a legal mortgagee was entitled to delivery of title deeds as against an equitable mortgagee who was a purchaser for value without notice, on the ground that this relief would have been given at law. The Judge said that under the Judicature Act “every Court is to administer everything — legal relief or equitable relief.”

So *In re Ingham*, *Jones v. Ingham*, 1893, 1 Ch. 352, 62 L. J. Ch. 100, 68 L. T. 152, 41 W. R. 235, a legal mortgagee was held entitled to delivery of title deeds which had been deposited by the mortgagor

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with a bank who were purchasers for value without notice. STIRLING, J., said, "It is laid down by JAMES, L. J., in *Heath v. Crealock* (*supra*), that a Court of equity never takes away from a purchaser for value without notice anything which he has himself acquired, and if my jurisdiction were equitable merely I could not deprive the bank of their deeds on the faith of which its money was honestly lent to Thomas Legham. But since the Judicature Acts this Court has power to decide on legal as well as equitable claims, and *In re Cooper, Cooper v. Vesey* (*supra*), is a case in which a mortgagee was ordered to deliver up title deeds at the instance of a legal owner."

It is to be considered also that according to the judgment of Lord HATHERLEY in *Newton v. Newton* (1868), L. R. 4 Ch. 143, 38 L. J. Ch. 145, before the Judicature Act, if a decree of a Court of equity would have been incomplete without ordering delivery of deeds, the Court would order such delivery notwithstanding the plea of purchaser for value without notice. And the refusals to order delivery in the case as to foreclosure of *Hunt v. Elmes* (*supra*) and *Heath v. Crealock* (*supra*) seem to depend on the principle that a foreclosure decree is not relief at all, but only a declaration that the equitable right to redeem has determined. See per Lord CRANWORTH, in *Colyer v. Finch* (1854), 5 H. L. C. 905, 26 L. J. Ch. 65, 3 Jur. (N. S.) 25. It does not appear to have been decided that in a foreclosure action since the Judicature Acts delivery of deeds would be decreed as against a purchaser for value without notice.

The Judicature Acts and the decision in *Ind, Coope & Co. v. Emmerson* have not placed legal and equitable estates on the same footing. When other equities, except priority of date, are equal, the legal estate gives priority as it did before. See cases cited *supra*, and *Taylor v. Russell*, 1892, A. C. 244, 61 L. J. Ch. 657, 66 L. T. 565, 41 W. R. 43.

The rule laid down in *Bassett v. Nosworthy*, *supra*, that a purchaser who has paid his purchase money may protect himself by subsequently acquired legal estate is, as will be seen in the notes to *Pilcher v. Rawlins* (*infra*), subject to some other qualifications. But the plea of purchaser for value without notice is in all cases subject to this, that the person urging it must have equal equity except as to priority of date.

As between two equitable owners, priority of date will give priority. See *Rice v. Rice*, 10 R. C. 507; but this is not the case where one of the purchasers has acquired a legal estate.

The rule in such case was expressed by Lord HATHERLEY in *Bates v. Johnson* (1859), John. 304, that to be entitled to tack and protect an equitable estate by subsequently acquiring a legal estate, the purchaser must stand in an equally good position as the owner of the prior equitable estate, except as regards time.

In *Bailey v. Barnes*, 16 R. C. 520 (1894, 1 Ch. 35, 37), LINDLEY, L. J., stated the rule as to priority given by the legal estate as follows: "Where equities are equal, the legal title shall prevail, as is shown by the cases on tacking. Equality means the non-existence of any encumbrance which affects the evidence of one of the rival claimants and makes it less meritorious than that of the other."

It was decided by the Court of Appeal in *Northern Counties of England Insurance Co. v. Whipp*, 10 R. C. 516 (26 Ch. D. 482, 496, 53 L. J. Ch. 629, 51 L. T. 806, 32 W. R. 626), that where the legal estate was acquired by a mortgagee contemporaneously with the advance, the Court will not postpone the holder of the legal estate to the holder of a subsequent equitable estate by reason of mere carelessness or want of prudence on the part of the legal mortgagee.

It appears also from the judgment of Lord WESTBURY, in *Phillips v. Phillips* (10 R. C. 553), and of FRY, J., in *Cave v. Cave* (1880), 15 Ch. D. 639, 646, 49 L. J. Ch. 505, 42 L. T. 730, 28 W. R. 793, that apart from all questions as to concurrent or auxiliary jurisdiction where the rival claimants have mere equitable estates, the defence of purchaser for value would not prevent the Court of Chancery exercising jurisdiction and declaring the priorities between them.

There remains the case put by Lord WESTBURY before the Judicature Acts, and recognised after the Judicature Acts by FRY, L. J., in *Cave v. Cave* (1880), 15 Ch. D. 647. "Where there are circumstances that give rise to an equity as distinguished from an equitable estate,—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake,—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere."

There is nothing in the judgments of the House of Lords and Court of Appeal in *Ind, Coope & Co. v. Emerson* (p. 706, *ante*), which in any way deals with the plea as an answer to such an equity, as it is recognised by FRY, J., since the Judicature Act on the authorities as they stand, it must be treated that against a claim by a plaintiff to such an equity the defence would be good.

But assuming this to be the case, it must often happen that the same circumstances which would give the right to have the deed set aside for fraud or mistake would be a defence at law to any action at law on the deed, and as Courts of equity must give legal relief as well as equitable relief, it would seem that though as against a purchaser for value without notice they would refuse to set aside the deed in the action of a plaintiff suing in equity, on the other hand if the purchaser for value without notice under the deed sued on the deed, the Courts must recognise the defence of fraud or mistake in any case where before the Judicature Act it could have been a defence at law.

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COTTON, L. J., in *National Provincial Bank of England v. Jackson* (1886), 33 Ch. D. 1, 40, 55 L. T. 458, 34 W. R. 597, says, "The rule of law is that if a person who seals and delivers a deed is misled by the misstatements or misrepresentation of the persons procuring the execution of the deeds so that he does not know what is the instrument to which he puts his hand, the deed is not his deed at all, because he was not minded nor intended to sign a document of that character or class, as, for instance, a release while intending to execute a lease." See also *Foster v. Mackinnon* (1869), L. R. 4 C. P. 704, 38 L. J. C. P. 310.

In *Onward Building Society v. Smithson* (C. A.), 1893, 1 Ch. 1, 62 L. J. Ch. 138, 68 L. T. 125, 41 W. R. 53, the plaintiffs were purchasers for value without notice of any fraud, but claiming title under a deed the execution of which had been obtained by misrepresentation, but not fraud of such a character as to make the deed void or support a plea of *non est factum*. The Court of Appeal expressed a doubt, but refused to decide whether the fact that a deed was obtained by fraudulent misrepresentation could be sustained, and a defence to a claim by a purchaser for value without notice of the fraud. Both parties appear to have had only equitable estates. LINDLEY, L. J., said: "If the defendants were seeking equitable relief against the plaintiffs, they could plead purchase for value without notice; but the defendants are not seeking relief."

AMERICAN NOTES.

"Nothing is clearer than that a purchaser for a valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, is entitled to priority in equity as well as at law, according to the well-known maxim that where equities are equal the law shall prevail." *Townsend v. Little*, 109 United States, 504, 511-512. Large numbers of cases illustrating this well established rule are collected in Ames' Cases on Trusts, 2nd ed. p. 286; 1 Perry on Trusts, 5th ed. sect. 218, note. The doctrine is admirably discussed in an article by Professor Ames in 1 Harvard Law Review, 1.

So "if a *bonâ fide* purchaser has the conveyance made to another in trust for him, the defrauded *cestui que trust* is as remediless as in the case where the purchaser takes the title in his own name. This is an illustration of the rule that an innocent purchaser is protected if he has either the title, or the best right to call for it." Ames' Cases on Trusts, 2nd ed. p. 286, citing *Kenicott v. Supervisors*, 16 Wallace (U. S.), 452; *New Orleans Canal and Banking Co. v. Montgomery*, 95 United States, 16; *Willis v. Henderson*, 5 Illinois, 13; *Peoria and Springfield R. Co. v. Thompson*, 103 Illinois, 187; *Stokes v. Riley*, 121 Illinois, 166.

If a purchaser for value without notice sells to a purchaser with notice, or to a volunteer, the latter is protected. *Alexander v. Pendleton*, 8 Cranch (U. S.), 462; *Wilkinson v. Solomon*, 83 Alabama, 438; *East v. Pugh*, 71 Iowa, 162; *Boynton v. Rees*, 8 Pickering (Mass.), 329; *Fulton v. Woodman*,

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54 Mississippi, 158; *Salmon v. Smith*, 58 Mississippi, 399; *Bell v. Twilight*, 18 New Hampshire, 159; *Bumpus v. Platner*, 1 Johnson Chanc. (N. Y.) 213; *Ash-ton's Appeal*, 73 Pennsylvania State, 153; 1 Jones on Mortgages, sects. 557, 559. The reason for this was thus expressed by Judge STORY: "Not only is a *bonâ fide* purchaser for a valuable consideration without notice protected in equity against a plaintiff seeking to overturn that title, but a purchaser with notice under such a *bonâ fide* purchaser without notice is entitled to the like protection. For otherwise it would happen that the title of such a *bonâ fide* purchaser would become unmarketable in his hands, and consequently he might be subjected to great losses, if not utter ruin." Equity Jurisprudence, 13th ed. sect. 1503 a.

But a trustee, actual or constructive, who, in fraud of the rights of the beneficiaries, conveys trust property to an innocent purchaser and then buys back the property himself, will hold it subject to the trust. In *Johnson v. Gibson*, 116 Illinois, 294, it was held that, while an innocent purchaser, without notice of the fraud, obtaining property from a fraudulent grantee, will be protected, and take the same purged of the fraud, yet if he reconveys the property to the fraudulent grantee, it may be reached in his hands, just as if he had never parted with it. And see 1 Jones on Mortgages, sect. 558. So in *Huling v. Abbott*, 86 California, 423, the Court held that an assignee of a certificate of purchase of state lands, who took with actual notice of an unrecorded mortgage by his assignor, remained affected as a purchaser with notice of the mortgage, and was not protected by the fact that he assigned his title to a *bonâ fide* purchaser for value, without notice of the mortgage, who reconveyed the lands to him. See also *Frost v. Frost*, 63 Maine, 399; *Clark v. McNeal*, 114 New York, 287; *Church v. Ruland*, 61 Pennsylvania State, 432.

In order to entitle one to protection as a *bonâ fide* purchaser, the consideration must be actually paid before notice is received of the trust or other equity. *Dugan v. Vattier*, 3 Blackford (Ind.), 245; *Rhodes v. Green*, 36 Indiana, 7, 10; *Blanchard v. Tyler*, 12 Michigan, 339; *Palmer v. Williams*, 21 Michigan, 328; *Patten v. Moore*, 32 New Hampshire, 382; *Murray v. Ballou*, 1 Johnson Chanc. (N. Y.) 566; *Christie v. Bishop*, 1 Barbour Chanc. (N. Y.) 105; *Jackson v. Cadwell*, 1 Cowen (N. Y.), 622; *Harris v. Norton*, 16 Barbour (N. Y.), 264; *McBee v. Loftis*, 1 Strobhart Eq. (S. Car.), 90; *Ecerts v. Agnes*, 4 Wisconsin, 343; Perry on Trusts, 5th ed. sect. 221; 1 Jones on Mortgages, sect. 555.

Thus in *Blanchard v. Tyler*, *supra*, where the defendant gave his non-negotiable note for land of which the complainant held a prior unrecorded deed, but was fully informed of the complainant's equities before making payment of the note, it was held that he could not claim protection as a *bonâ fide* purchaser.

The case of *Parker v. Crittenden*, 37 Connecticut, 148, is *contra* to the great preponderance of authority on this point. There A., with intent to defraud his creditors, sold a hack to B., who participated in the fraud. B. afterwards sold it to C., who had no knowledge of the fraud. Creditors of A. having attached the hack, C. replevied it, and the Court held that he should be protected as a *bonâ fide* purchaser, though he had not yet paid for the property.

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According to Judge STORY's decision in *Wood v. Mann*, 1 Sumner (U. S. Cir. Ct.), 506, one cannot rank as a *bonâ fide* purchaser unless he has paid the whole consideration before receiving notice. See also *Wormley v. Wormley*, 8 Wheaton (U. S. Sup. Ct.), 421; *Doswell v. Buchanan*, 3 Leigh (Va.), 565. But the prevailing view is that a purchaser who receives notice after a partial payment of the consideration, cannot be compelled to surrender the property except upon receiving reimbursement for what he paid before notice. *Florence Sewing Mach. Co. v. Zeigler*, 58 Alabama, 221; *Baldwin v. Sager*, 70 Illinois, 503; *Rhodes v. Green*, 36 Indiana, 7; *Kitteridge v. Chapman*, 36 Iowa, 348; *Dougherty v. Cooper*, 77 Missouri, 528; *Sargent v. Eureka Spind Apparatus Co.*, 46 Hun (N. Y.), 19 (but see *Warren v. Wilder*, 114 New York, 209); *Everts v. Agnes*, 4 Wisconsin, 343; 1 Jones on Mortgages, sect. 556. "There is authority, indeed, for the position that a purchaser under such circumstances may retain the property purchased subject to a lien for the amount of the unpaid purchase money in favor of the equitable incumbrancer." Ames' Cases on Trusts, 2nd ed. p. 288, citing several cases.

Cases where the consideration is paid before notice, but the conveyance is not executed until afterwards, are considered in the notes to *Pilcher v. Rawlins*, *infra*.

With regard to the nature of the consideration requisite to entitle a purchaser to protection, "it is well established that a conveyance, to be good against the equitable interest of the *cestui que trust*, must be for a *valuable* consideration, and that a conveyance for a *good* consideration, as love and affection, is not sufficient. But if the consideration is valuable, it need not be adequate: mere inadequacy of consideration will not defeat a purchase for a valuable consideration without notice: but gross inadequacy of a valuable consideration would be evidence affecting the good faith of the transaction." Perry on Trusts, 5th ed. sect. 220.

The same question arises under the Statute of Elizabeth relating to conveyances in fraud of creditors. Mr. Bigelow says: "The question now proposed for consideration is of the meaning of the words 'good consideration' in this statute. And here at the outset, we have a striking instance of the application of the rule of construction of statutes passed for the repression of fraud; the rule, that is, of liberal construction. The word 'good' as a designation of consideration is, in its legal sense, used in distinction from and opposition to 'valuable;' and that this was true in the time of the statute is clear. But the Courts at once perceived that to give the word its technical meaning would well-nigh defeat the whole object of the Act; for it would save all voluntary conveyances made in good faith. Hence the word 'good' was construed from the first to mean 'valuable;' and this has been the meaning always and everywhere given to it." 2 Bigelow on Fraud, ch. xviii.

In the case of bills and notes, it has been held that the surrender of negotiable securities is a sufficient consideration to entitle one to the rights of a *bonâ fide* holder. *Bank of Salina v. Babcock*, 21 Wendell (N. Y.), 499. Not so, however, if the securities are confessedly worthless. *Stewart v. Small*, 2 Barbour (N. Y.), 559. One gives value who extinguishes a debt by merging it in the paper taken for it. *Bank of Sandusky v. Scoville*, 24 Wendell (N. Y.), 115. So an agreement to forbear has been held to be value, being

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the surrender of a right. *Oates v. National Bank*, 100 United States, 239; *Traders' Bank of Rochester v. Bradner*, 43 Barbour (N. Y.), 379; *Lewis v. Rogers*, 34 New York Superior Ct. 61; *Cary v. White*, 52 New York, 138. But see *Francis v. Joseph*, 3 Edwards Chanc. (N. Y.) 182; *Wardell v. Howell*, 9 Wendell (N. Y.), 170. On the question whether paper taken in conditional payment of a debt is taken for value, the American decisions are in conflict. So also on the question whether one who takes a bill or note as collateral security for an antecedent debt ranks as a holder for value. The cases on both sides of these questions are collected in 1 Ames' Cases on Bills and Notes, p. 650, note, and p. 667, note.

Purchase for value is a good defence to a bill for discovery and may be taken advantage of by plea or demurrer. Story, Equity Pleading, 10th ed. sects. 603, 824; Story, Equity Jurisprudence, 13th ed. sect. 1502; Shipman, Equity Pleading, pp. 404, 475; 6 Encycl. of Pleading and Practice, pp. 774, 779; *Boone v. Chiles*, 10 Peters (U. S. Sup. Ct.), 177, 211.

"Another objection which may be taken by way of demurrer to a bill of discovery is, that the defendant has an equal equity with the plaintiff, and is therefore entitled to be protected from a discovery which will endanger, or disturb, or destroy his present rights. Therefore, if a defendant has in conscience a right equal to that claimed by the person filing a bill against him, although not clothed with a perfect legal title, this circumstance, in the situation of the defendant, renders it improper for a Court of equity to compel him to make any discovery which may hazard his title. And if the matter appears clearly on the face of the bill, a demurrer will hold. The most obvious case is that of a purchaser for a valuable consideration without notice of the plaintiff's claim." Story, Equity Pleading, 10th ed. sect. 603.

This and other topics connected with purchase for value are learnedly discussed in Langdell's Summary of Equity Pleading, ch. vii.

No. 3. — PILCHER *v.* RAWLINS.

(1872.)

RULE.

A PURCHASER paying the purchase money and taking the legal estate contemporaneously is protected by it against any prior equitable estate or equity of which he had no notice.

- (1) Although the person who conveys the legal estate knowingly commits a fraud or breach of trust in conveying it.
- (2) Although the title to the legal estate is taken through an instrument which discloses the prior estate or equity, if such instrument is concealed from the purchaser.

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L. R. 7 Ch. 259-274 (s. c. 41 L. J. Ch. 485; 25 L. T. 921; 20 W. R. 281).

Purchaser for Value without Notice. — Equal Equities. — Legal Estate. [259]

The defence of purchase for value without notice may be sustained, although the defendant, in order to make out his title to the legal estate, must rely on an instrument which discloses the title of the plaintiff, the defendant not having had notice of such instrument at the time of his purchase.

The trustees of a settlement advanced the trust money on the security of real property which was conveyed to them by the mortgagor, the mortgage deed noticing the trust. The surviving trustee of the settlement afterwards reconveyed part of the property to the mortgagor on payment of part of the mortgage money, which he appropriated. The mortgagor then conveyed that part of the property to new mortgagees, concealing, with the connivance of the trustee, both the prior mortgage and the reconveyance. When the fraud was discovered, the *cestuis que trust* under the settlement filed a bill against the new mortgagees claiming priority:—

Held, that the Court would not interfere to take away the legal estate which passed to the new mortgagees under the reconveyance.

The trustees of a settlement advanced the trust money on the security of real property which was conveyed to them by the mortgagor, the mortgage deed noticing the trust. The surviving trustee afterwards induced the mortgagor* to execute a deed by which the mortgaged property [*260] purported to be conveyed to the trustee as on a purchase by him, though no money in fact passed. The trustee then, concealing the prior mortgage, and showing title under the pretended purchase deed, conveyed the property to a mortgagee without notice:—

Held, that the Court would not interfere to take away the legal estate from the mortgagee.

This was a suit to establish the priorities of *cestuis que trust* as mortgagees over other mortgagees who had obtained the legal estate with, as alleged, notice of the trust.

On the 23rd of August, 1830, a settlement was made by Jeremiah Pilcher, under which J. G. Pilcher, G. Pilcher, and W. H. Pilcher were to stand possessed of £8373 in trust for Jeremiah Pilcher during his life, and after his death for his children by a former marriage. There was power to the trustees to vary the investments with the consent of Jeremiah Pilcher during his life. The settlement contained the usual trustees' receipt clause, and a power of appointing new trustees exercisable by J. Pilcher during his life.

In 1851 the £8373 was advanced to Robert Rawlins on the

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security of a mortgage deed dated the 23rd of April, 1851, and made between R. Rawlins, of the first part, J. G. Pilcher, G. Pilcher, and W. H. Pilcher, of the second part, and J. Pilcher, of the third part; whereby, after reciting that J. G. Pilcher, G. Pilcher, and W. H. Pilcher had agreed to lend and advance the sum of £8373 (the same being trust money) with the consent and approbation of J. Pilcher, it was witnessed that certain real property, including the Whitechurch property and the Smithfield and New Street property hereinafter mentioned, was conveyed by Rawlins to J. G. Pilcher, G. Pilcher, and W. H. Pilcher, their heirs and assigns, subject to redemption on payment of interest and of the £8373, on the 23rd of April, 1856.

Upon the execution of this deed the documents of title relating to the property were delivered to W. H. Pilcher, who was a solicitor, to be held by him on behalf of himself and his co-trustees. J. G. Pilcher and G. Pilcher died in 1853, leaving W.

H. Pilcher sole trustee.

[* 261] * In 1856 Rawlins, who had been a solicitor, made out, with the connivance of W. H. Pilcher, an abstract of title ending with a document earlier than the above-mentioned mortgage, thus showing a title in fee simple in himself; and induced two trustees named Stockwell and Lamb to advance him £10,000 on the security (with other property) of the Whitechurch property, part of the property comprised in the above-mentioned mortgage; and by a deed dated the 2nd of April, 1856, it was witnessed that Rawlins conveyed the Whitechurch property to Stockwell and Lamb in fee, subject to redemption on payment of the £10,000 in the usual manner.

On the same 2nd of April, 1856, and prior to the execution of the mortgage to Stockwell and Lamb, W. H. Pilcher had executed an indenture, which was unstamped until after this suit had been instituted, and which apparently was not to have been used unless it became necessary to use it. By this indenture it was witnessed that W. H. Pilcher, in consideration of the payment to him by Rawlins of £3500, conveyed the Whitechurch property to Rawlins in fee discharged from the mortgage debt of £8373. No receipt was indorsed on this deed, which was only produced after the institution of this suit, and was then handed by Rawlins to Stockwell and Lamb, who thus discovered that they had the legal estate, though not by the deeds on which they had relied. Raw-

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lins and W. H. Pilcher appeared to have shared the £10,000 advanced by Stockwell and Lamb; and the title deeds of the Whitechurch property, with the exception of the mortgage deed of 1851 and the reconveyance, were delivered to Stockwell and Lamb.

Under a second settlement also made by Jeremiah Pilcher on the 23rd of August, 1830, W. H. Pilcher was, in 1860, the surviving trustee of a sum of £3000 held in trust for Jeremiah Pilcher and his second wife, and the children of a second marriage. This sum had been advanced to Rawlins on the security of the property comprised in the mortgage of the 23rd of April, 1851, and of certain other property, both of which were conveyed to the trustees of the settlement by a mortgage deed dated the 30th of May, 1854, and containing notice of the settlement. W. H. Pilcher was also co-executor with one J. H. Ward of the estate of one J. Matthews, and having received £3000, part of the estate, he, in November, 1860, agreed to give to J. H. Ward security for the £3000; and with that *in view, W. H. Pilcher [*262] and Rawlins acted as follows: By a deed purporting to be a purchase deed, and dated the 11th of April, 1861, Rawlins, in consideration of £2590, expressed to be paid to him by W. H. Pilcher, purported to convey to W. H. Pilcher the Smithfield and New Street property. A receipt for £2590 was indorsed, but no money actually passed. W. H. Pilcher then delivered an abstract of title, suppressing the mortgages of 1851 and 1854, and showing a title in fee simple in himself. This was accepted by the conveying counsel of the Court of Chancery, and a mortgage was executed by W. H. Pilcher conveying these properties to Ward as security for the £3000.

W. H. Pilcher continued until 1864 to pay the interest due on the trust funds to J. Pilcher. In July, 1865, J. Pilcher called upon W. H. Pilcher to hand over the deeds, and received from him a box containing the two mortgage deeds only, the result of which was that the dealings of W. H. Pilcher and Rawlins were then in part discovered.

Jeremiah Pilcher and his children thereupon filed their bill in this suit against Rawlins, W. H. Pilcher, Stockwell and Lamb, Ward, and others, praying that the priorities of the charges affecting the property comprised in the mortgage of 1851 might be ascertained, and that Stockwell and Lamb as to the Whitechurch

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property, and Ward as to the other property mortgaged to him, and forming part of the securities of 1851 and 1854, might be restrained from dealing with the legal estates vested in them, and that directions might be given for conveying such legal estates for the security of the plaintiffs.

The defendants Stockwell and Lamb and the defendant Ward, by their answers, pleaded that they were purchasers for value without notice, and claimed the benefit of the legal estates vested in them respectively.

The MASTER OF THE ROLLS was of opinion that the mortgage of 1851 had priority over the mortgage to Stockwell and Lamb and over the mortgage to Ward, and made a decree accordingly, as reported (L. R. 11 Eq. 53), where the facts of the case are more fully stated.

The defendant Lamb (Stockwell being dead) and the defendant Ward appealed.

[* 263] * The Solicitor-General (Sir G. Jessel), and Mr. H. Humphreys, for Lamb:—

We contend, in the first place, that the mere mention of the fact of the money being trust money was not enough to bind any one to look for the *cestuis que trust*. Besides, after all, a fair proportion of the mortgage money was actually paid, and to the proper person to receive it; it is true that he has misapplied it, but we are not liable. It was said that the money was paid before the day for redemption, and that only part of it was paid, which rendered the concurrence of Jeremiah Pilcher necessary; but such refinements are shocking to common sense. Any refinements should be on our side, for it was the plaintiffs, and not we, who, by trusting W. H. Pilcher, and leaving him sole trustee, enabled him to commit this fraud. *Carter v. Carter*, 3 K. & J. 617, went perhaps too far, but this goes still further. We say that we have the legal estate, and that there is no equity to deprive us of it. *Maunderell v. Maunderell*, 10 Ves. 246; *Bates v. Johnson*, Joh. 304. The whole doctrine of attendant terms depends upon this. We had, when we advanced the money, neither actual nor constructive notice of the prior mortgage, and our equity is as good as that of the plaintiffs, — in fact better, for they chose to trust a sole trustee. We trusted no one, and took our mortgage in the regular way, and after due investigation of the title. No doubt we were not aware of the reconveyance to Rawlins, but by that

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means we get the legal estate, and we ought not to be deprived of it. We are purchasers for valuable consideration. We ask no relief; we only ask to be let alone. *Ex parte Knott*, 11 Ves. 609, was a clear case. In *Jones v. Poyles*, 3 My. & K. 581, the trustee was interested, as in this case. *Dodds v. Hills*, 2 H. & M. 424, is in our favour. The plaintiffs do not venture to ask that the reconveyance should be set aside, but ask that the legal estate conveyed by it may be dealt with to protect them. But why? Why are we to be deprived of it?

Sir R. Baggalay, Q.C., and Mr. Ferrers, for Ward:—

We claim the benefit of all the arguments on behalf of Stockwell and Lamb, but our case is stronger. We have in no sense been *guilty of laches. No doubt the conveyance [*264] to Pilcher was intended as a blind, and deceived us; but we have without it the legal estate, and we are purchasers without notice, and with the legal estate.

Mr. Southgate, Q.C., and Mr. Bristowe, Q.C., for the plaintiffs:—

We, too, are innocent, and we have the earliest equity. It was against conscience that our trustee should deal as he did, and legal estates so obtained cannot be set up. The legal estate can be claimed only through a deed which shows the trust, and thus those who take under it are bound by it. Rawlins' deeds conveyed nothing, because there was a prior deed; and if the deed of 1851 had been produced, as it must be, to make out the title to the legal estate, the mortgagees would have been bound to call for production of the deed of 1830, and then W. H. Pilcher could not have committed these frauds. There is no case in which a trustee has, in derogation of his duty, conveyed the legal estate, and the person taking the legal estate has been allowed to avail himself of it. *Carter v. Carter* only followed *Willoughby v. Willoughby*, 1 T. R. 763, and *Saunders v. Dehew*, 2 Vern. 271. No doubt, if you take a conveyance for valuable consideration without notice, you can, when you find out a fraud, protect yourself by getting in a legal estate; but you cannot do so if you have notice at the time; and here the defendants cannot show their title without showing notice. If a man paid his money on a forged deed, he could not afterwards, by getting in the legal estate, protect himself. It is not true that the plaintiffs have trusted the trustee; on the contrary, they gave notice on the mortgage deeds that it was

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trust money. *Phillips v. Phillips*, 4 D. F. & J. 208; *Colyer v. Finch*, 19 Beav. 500, 5 H. L. C. 905. Can the Court allow a trustee, who is the creature of the Court, to injure his *cestuis que trust* in this way? The mortgagees' claim under a fraud; we do not. In *Jones v. Powles* the facts could not, by any reasonable diligence, have been discovered.

Mr. Kingdon, who was with them, was not heard, as two counsel on that side had been heard.

[* 265] * Mr. Roxburgh, Q.C., and Mr. Drewry, for the representatives of W. H. Pilcher, who was dead.

Mr. Shapter, Q.C., Mr. W. Pearson, and Mr. H. C. Ward, for other parties.

The Solicitor-General, in reply.

Jan. 29. Lord HATHERLEY, L.C., after stating the facts of the case, continued:—

The defendant Rawlins could not have transferred the legal estate in the property except through the medium of the reconveyance of 1856, and the MASTER OF THE ROLLS considered the case to be similar in that respect to the case of *Carter v. Carter*, 3 K. & J. 617. The authority of that case has been strongly impugned in argument by the counsel for the appellants, and the decision is, I believe, not approved of by the LORDS JUSTICES. That case may be thus briefly stated: John Carter, the mortgagor, believing himself to be entitled, under the will of his father, to certain shares in real estate in fee, conveyed his shares and all other his estate and interest in the property by way of mortgage to the mortgagee. This was done in good faith, but subsequently a later will was discovered by which the mortgagor took an estate in fee, but in trust for himself for life only, and as to the remainder in fee, in trust for several persons and objects mentioned in the will. The mortgagee, a defendant in the suit, insisted that he was entitled to hold the fee of the mortgaged shares as against the *cestuis que trust* in remainder, John Carter having conveyed to him the fee of such property without any notice of the trusts under the second will. I held that this could not be so, the only title to the fee in John Carter being that which, on its face, disclosed the title of his *cestuis que trust*; in fact, that either I must have made John Carter, without any evil intention or want of care on his part, guilty of a gross breach of trust, and have then suffered the fruits of that

breach of trust to be enjoyed by his mortgagee, or I must have said that a title was not acquired by the mortgagee against the equitable owner.

* I did not follow a case of *Fausset v. Carpenter*, 2 Dow. [* 266] & Cl. 232, 5 Bli. (N.S.) 75, decided by Lords TENTERDEN and WYNFORD, but greatly disapproved of by Lord St. LEONARDS in his treatise on the Law of Property as Administered in the House of Lords (page 81). In that case a conveyance made by a trustee having both a legal and an equitable interest in the land, and conveying in general terms, was held not to pass the estate held by him as the trustee. I thought that the legal estate of John Carter did pass, it being his clear intent to pass the fee which he supposed to be his own; but I thought that I was entitled to say to the mortgagee: "You cannot say you have contracted for the estate of the *cestuis que trust*, to which the mortgagor could only make a title by the second will, which will disclosed the trusts."

The case now before us differs in many respects from the case of *Carter v. Carter*. An intentional fraud has been committed, and the parties to it have been enabled to effect their purpose owing to the *cestuis que trust* allowing the trustee, originally one of three, to become the sole trustee. As sole trustee he necessarily had possession of the title deeds to the mortgaged estate; so that, by the reconveyance to the mortgagor, the mortgagor became repossessed of the legal estate, and, by keeping back the whole mortgage transaction, was enabled to show a complete legal title to the property. Had he disclosed the mortgage, I think that the mortgage deed would have put the parties dealing with him on inquiry; but as matters were conducted, the mortgagee acquired the legal estate, and entered into possession of the property without notice of the prior charge, and he must, I think, be entitled to hold it.

The plea of purchase without notice states only possession on the part of the professed owner, conveyance of the estate, and absence of notice; and the cases undoubtedly have gone very far (as I had occasion to observe in *Carter v. Carter*) in showing that on such a plea, when proved, equity declines all interference with the purchaser, having, as is said, no ground on which it can affect his conscience. I confess that the extent to which this doctrine has been carried was not wholly satisfactory to me when I decided

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Carter v. Carter. There neither the mortgagees, the purchaser, nor the mortgagor had the slightest notion that the trans- [* 267] action * was one in which the mortgagor was dealing with the interest of others. The mortgagees had taken all the estate of John Carter under the first will, which was found afterwards to be a nullity; the fact of the mortgagor under the supposed will having an estate vested in him, in trust for others, being unknown to both parties. I confess that if this case had been of the same character I should hesitate long before I held that the estates of the *cestuis que trust* could be so conveyed, or that the ignorance of the mortgagor could make him guilty of a breach of trust, or that his act executed wholly *diverso intuitu* could dispose of interests in which he had no concern.

Suppose a conveyance made by a man without title, and that afterwards the real owner makes this man a trustee of a settlement, and conveys the estate to him, would the *cestuis que trust* lose the estate by the estoppel of their trustee under his conveyance?

Or, suppose that a person who conveyed in the belief that he had a title, and afterwards, as heir of the real owner, acquired the legal estate by the death of a devisee in trust in the lifetime of a testator, and only on the trusts of a will, would the *cestuis que trust* in that case lose their estate?

I referred in *Carter v. Carter* to the observations of Lord ELDON in *Maundrell v. Maundrell*, 10 Ves. 246, and *Ex parte Knott*, 11 Ves. 609, as to the difficulty of allowing a purchaser to hold an estate which was got in by him from a person who could not convey without committing a breach of trust; and it appeared to me then, as now, that Lord ELDON applied his observations to a case in which the purchaser had advanced his money in good faith, but took the legal estate afterwards from one whom he knew to be a trustee for others, distinguishing that case from the case of a legal estate acquired by paying off a mortgage. In itself it is immaterial whether the purchaser knows or not that another has an equitable interest prior to his own, provided he did not know that fact on paying his purchase money. It may perhaps be sufficient in all possible cases for the purchaser to say, "I am not to be sued in equity at all. I hold what was conveyed to me by one in possession, who was, or pretended to be, seised, and who conveyed to me without my having notice of another equitable

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title;" and *that the plaintiff in equity must disprove [*268] the plea before he can proceed any further with his suit.

But I know of no case either before or since *Carter v. Carter*, in which the legal estate so conveyed to the purchaser was held by the vendor on express trusts appearing on the face of the only instrument under which the vendor could make a complete title, so that a trustee of a settlement comprising estates of any magnitude, and being in possession on behalf of a minor, for instance, could, by forging a conveyance to himself, pass an indefeasible title to a purchaser.

The present case is not such a case, and I can therefore concur with the view of the LORDS JUSTICES that the decree must be reversed.

Sir W. M. JAMES, L.J. :—

I entirely concur in the conclusion to which the LORD CHANCELLOR has arrived.

I do not mean, in the few observations which I am about to make, to refer to a class of cases which appear to me entirely distinct in principle from the case now before us. I mean that class of cases in which a person finding himself in possession under a defective title has cast about to cure that defect by procuring some one else to convey an outstanding legal estate. No doubt it has been held in this Court that a man under those circumstances may get in a mortgage and tack his defective title to the estate of that mortgagee. He has also been allowed to get in an outstanding legal estate from a person who, being a trustee for the real owner, is not a trustee for the person seeking the conveyance. But those cases where the person seeking the conveyance knew the fact that the trustee was trustee for somebody else, and could not convey without a breach of trust, whilst the trustee was left in ignorance, — those cases, I say, involve a principle which I have never been able to understand.

I propose simply to apply myself to the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase deed, some legal estate, some legal right, some legal advantage; and, according to my view of the established law of this Court, such a purchaser's *plea of a purchase for valuable consideration [*269] without notice is an absolute, unqualified, unanswerable

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defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser, when he has once put in that plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the *bona fides* or *mala fides* of his purchase, and also the presence or the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgment, this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him.

In the case of *Carter v. Carter*, 3 K. & J. 617, which was decided by the present LORD CHANCELLOR, and which was followed by the MASTER OF THE ROLLS in this case, and with which I am bound to say I am unable to agree, an exception from that rule was, under the circumstances, supposed to exist.

It is very clearly expressed in a few lines of the judgment in that case: "But here the purchaser taking the conveyance under one will, supposed by all parties to be really the last will of the testator, finds himself driven to rely upon another and a second will containing on the face of it all the trusts which the testator has created;" — and that circumstance is supposed to create the exception. To my mind there are to that supposition two short and conclusive answers, — the one a matter of principle, and the other a matter of fact. My view of the principle is, that when once you have arrived at the conclusion that the purchaser is a purchaser for valuable consideration without notice, the Court has no right to ask him, and has no right to put him to contest the question, how he is going to defend himself, or what he is going to rely on. He may say, honestly and justly, "I am not going to tell you. I have got the deeds; I defend them, and you will never be able to make me produce them, and you will never be able to produce secondary evidence of them. I am not obliged to [* 270] produce them * at all; probably before you get half way through your action of ejectment you will find a *jus tertii* which you will not dispose of; the estate is in the hands of a legal tenant to whom I have let it, and no one can determine that tenancy without notice, and no one can give that notice but myself;

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I will not give that notice, and no Court has any power to compel me to give it. I have a right to rely, as every person defending his position has, on the weakness of the title of the person who is seeking to displace me." That seems to be exactly the position of such a purchaser as this.

The purchaser in *Carter v. Carter* did not rely on the will which created the trust; he relied on another title; for the will formed the title of the adverse party. And the answer to that adverse party is, by the good luck which sometimes attends honest men, "Though you produce an instrument which points out your title, and gives the property to some one else, yet I am prepared with a legal defence in a conveyance which was executed before." It appears to me that there is no right in this Court to prevent the purchaser from setting up that defence to the claim so made against him. If there was ever a case in which, according to my judgment, any Court ought to be in favour of a purchaser and against such a title, it is a case in which a testator has, through the grossest negligence, allowed two wills to exist after his death, so that some members of his family produce one will apparently making out a perfectly good title to a mortgagee or purchaser, and then, when a mortgagee or purchaser has been induced unwittingly to pay or advance his money, some other members of the family produce the other will, which has been suppressed or concealed during the whole of that time, and then seek to take the estate away from the mortgagee or purchaser. It seems to me to be a very ingenious device by which a testator would be able to give his property twice over to his family; but, in my opinion, it is a device which ought not to be encouraged in any way in a Court of equity.

I am therefore of opinion that whatever may be the accident by which a purchaser has obtained a good legal title, and in respect of which he has paid his money and is in possession of the * property, he is entitled to the benefit of that acci- [* 271] dent, just as a purchaser would be entitled to avail himself of the possession so acquired, without any reference to the rights of the persons who may be otherwise interested.

In the course of the argument it was sought to draw a distinction in these cases where the object is to ascertain priorities; but even in suits of that nature the legal title is inquired into. I apprehend that when a mortgagee is in possession of the legal

estate there is no equity to make him reconvey (in my judgment that is the test), and he is entitled to hold it until every part of his encumbrance has been paid.

It was said in argument that where a man has a second encumbrance on an estate, but has the legal right of possession, and the legal right to the possession of the deeds, he has been made to produce those deeds. I apprehend that that cannot be right except under these circumstances: If a man, being, as he may well be, second encumbrancer on an estate, and also in law the owner of the deeds, seeks to avail himself of the assistance of the Court for the purposes of giving effect to his charge upon the estate, then it may be right to force him to bring in anything which he may have. I do not say anything about that, if he is availing himself of the assistance of this Court to redeem the first mortgage or to be redeemed himself. But where a man has got the deeds, and has got a puisne encumbrance, and says, "I do not want the assistance of the Court; I disclaim any interference on the part of the Court to deal with the property as it pleases; I am perfectly content to rest on my possession of the deeds," — if he is minded to say that, I apprehend that he has as much right to retain the deeds in his box as he would be entitled to keep possession of a box of diamonds if they had been pledged with him by way of collateral security.

The decision in the case of *Carter v. Carter*, which has been so much referred to, is a decision which I have considered for some years, and I have more than once thought it right to express my views of that case. I differ in some respects in my views from those of the LORD CHANCELLOR with regard to that case, but I say that the right of a person without notice is absolute and unqualified, when once he has made it out.

[* 272] *SIR G. MELLISH, L.J.: —

I agree in the conclusion to which the LORD CHANCELLOR and the LORD JUSTICE have arrived. I do not think it necessary to give any opinion whether *Carter v. Carter*, 3 K. & J. 617, was rightly decided. In my opinion if it is to be supported it must be supported upon the grounds stated by the LORD CHANCELLOR to-day, namely, that there were such peculiar circumstances in that case as to make it inequitable that the purchaser should be allowed to rely upon the second will. But I think it cannot be

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supported on the grounds upon which the MASTER OF THE ROLLS thought it had been decided, and upon which the MASTER OF THE ROLLS acted in the case now before us. The MASTER OF THE ROLLS, as I understand his judgment, held that a purchaser for valuable consideration, who has obtained a conveyance of the legal estate, is in this Court always to be held to have notice of the contents of the deeds which form a link in the chain by which the legal estate was conveyed to him. And he held that the doctrine of constructive notice ought to be enlarged, and that, although in point of fact the deed in question was never produced to the purchaser — although he had neither knowledge nor the means of knowledge of its contents — although he and his advisers were guilty of no negligence whatever in not obtaining knowledge of its contents — yet, nevertheless, he must in this Court be held to have notice of the contents, if it was a deed which, when ejectment was brought against him in a Court of law, he would be bound to produce.

It is admitted that that rule has never been laid down prior to the case of *Carter v. Carter*; there were not even *dicta*, or any authority whatever that I have been able to find, tending to show that any such rule had prevailed in this Court; and I am of opinion most clearly that it ought not to be so laid down.

I do not agree with the MASTER OF THE ROLLS that the purchaser for valuable consideration in such a case as he describes, is approbating and reprobating. A person who approbates and reprobates is acting inconsistently. He must, in fact, be affirming and denying the same proposition at the same time. But I cannot see any such inconsistency here. If an action of ejectment is brought, it is wholly immaterial whether the defendant in that action of ejectment had or had not at any time whatever notice of the contents * of the deed or instrument on which he rests [* 273] his title. What inconsistency is there in his saying, "If I am attacked in a Court of law, and an action of ejectment is brought against me, I rely on this deed as being one of the deeds through which the legal estate has been conveyed to me?" and then, if he is attacked in a Court of equity, saying, as the truth is, "I had no notice of this deed. At the time when I obtained my conveyance I had no knowledge and no means of knowledge of the deed." I cannot see that there is any inconsistency in his so acting.

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The general rule seems to be laid down in the clearest terms by all the great authorities in equity, and has been acted on for a great number of years, namely, that this Court will not take an estate from a purchaser who has bought for valuable consideration without notice; and I find that the appellants in both the cases before us are very clearly purchasers for valuable consideration without notice. Unless this doctrine of constructive notice, enlarged as it has been by the MASTER OF THE ROLLS, is to prevail, I am of opinion that the appellants have made out their case.

As it is admitted that, with the exception of what is supposed to have been said in *Carter v. Carter*, this rule of constructive notices, as laid down by the MASTER OF THE ROLLS, has never been established, I will proceed to consider it a little upon principle. It happens, curiously enough, that in one, if not in both, of the two cases before us the appellants are themselves trustees for other *cestuis que trust*, and the question then arises which of the two sets of *cestuis que trust* are to bear the loss. Is the loss to fall upon the *cestuis que trust* whose trustee has fraudulently conveyed away the estate which was entrusted to him? Or is the loss to fall upon those whose trustees have honestly taken a conveyance of that estate and who have advanced the money of their *cestuis que trust* on the faith of that estate which they have really got?

It is surely desirable that the rules of this Court should be in accordance with the ordinary feelings of justice of mankind. Now if the first set of *cestuis que trust*, those who will unfortunately have to bear the loss, were asked how it happened that they had suffered this loss, they would answer that their father conveyed the estate to their uncle, and he turned out to be a dishonest man, and parted with the estate. That is an explanation [*274] which any ordinary man of intelligence would understand. It might not be satisfactory to the losers, but they must see at once how it came to happen that they lost their estate. If you trust your property to a man who turns out to be a rogue, it stands to reason that you may lose it. But supposing the MASTER OF THE ROLLS' doctrine to prevail, and supposing the other *cestuis que trust* to be asked how they had lost their property, the answer would be, "Our trustee invested our property on mortgage on the faith of a person who said that he had the legal estate, and who had it, and who conveyed it to our trustee as a

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security for the sums advanced, our trustee being guilty of no negligence whatever, having taken the advice of a perfectly competent conveyancer in order to see that the title was a good one. But the Court of Chancery says that we have lost it because our trustees had notice of the prior mortgage; though they had, in fact, no notice whatever. They had neither knowledge nor means of knowledge, but nevertheless the Court of Chancery says that, according to its doctrine, they had notice." The only conclusion which any one would come to is that these *cestuis que trust* had been deprived of their property by the Court of Chancery, for reasons which, to an ordinary mind, were perfectly incomprehensible.

I am clearly of opinion, whether, under the peculiar circumstances of that case, *Carter v. Carter* was rightly decided or not, as to which I will say nothing, that where a trustee in breach of trust conveys away a legal estate which he possesses, and that legal estate comes into the possession of a purchaser for valuable consideration without notice, that purchaser can hold the property against the *cestuis que trust* who were defrauded by the conveyance of the trustee; and that it makes no difference whatever that if the purchaser is challenged in a Court of law, and an action of ejectment is brought against him, he may have to rely upon some deed which was in fact concealed from him, and of which he had neither knowledge nor means of knowledge.

ENGLISH NOTES.

Where the purchaser acquires the legal estate contemporaneously with his payment. — The rule as laid down in *Pilcher v. Rawlins* is that a purchaser who pays his money without notice of a prior equitable estate or claim affecting either the equitable or the legal estate, and obtains the legal estate contemporaneously with the payment, is protected by it against any prior equity or equitable estate. It will be seen from the cases cited, *supra*, that this must be qualified by saying, other equities being equal, except priority of date.

In *Pilcher v. Rawlins*, it was also decided, overruling a prior decision of Lord HATHERLEY in *Carter v. Carter* (1857), 3 K. & J. 617, 27 L. J. Ch. 74, 4 Jur. (N. S.) 63, that the defence might be sustained by the purchaser, although in order to make out his title to the legal estate he had to rely on an instrument which disclosed the title of the equitable owner. It will be seen, however, from the case of *Patman v. Harland* (p. 752, *post*), that if the prior documents of title disclosed

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the equitable interest, the purchaser would not be protected unless those documents were concealed *from him*. If in investigating the usual title they would have been disclosed, the purchaser would not be a purchaser without notice; he would be affected with constructive notice, though he did not examine the deeds.

See also *Jones v. Powles* (1834), 3 My. & K. 581, where the MASTER OF THE ROLLS held that the rule would protect a purchaser who relied on a false allegation of fact of title only if the falsehood could not have been discovered by "reasonable diligence."

Pilcher v. Rawlins also decides that the purchaser without notice is protected if the payment of the purchase money and conveyance of the legal estate are contemporaneous, although the legal estate be taken from a person who knows that it is affected with a trust, or that he is committing a fraud in conveying it. See also on this *Jones v. Powles* (1834), 3 My. & K. 581, where the purchaser purchased from a person who set up title under a forged will and had absolutely no title, but the legal estate was obtained contemporaneously from a mortgagee of the deceased owner whose mortgage was satisfied, and it was held that this legal estate protected the purchaser against a claim by the heir of the deceased.

See also *Young v. Young* (1867), L. R. 3 Eq. 801, when the sale was by the heir concealing a will, and *Carter v. Carter* (1857), 3 K. & J. 617, 27 L. J. N. S. Ch. 74, 4 Jur. (N. S.) 63.

When the legal estate is acquired subsequently to payment.— Somewhat different considerations apply when the legal estate is acquired by the purchaser subsequently to the payment of his money. This is most common in what is called tacking mortgages. It is accordingly noticed in the volume on mortgages, and the notes to *Earl of Bristol v. Hungerford* and *Bailey v. Barnes*, see 18 R. C., p. 508 to 523, and *Marsh v. Lee*, 18 R. C., p. 523. There is a full discussion of the cases in 2 White & Tudor Lead. Cas. notes to *Marsh v. Lee*.

The leading rules as to it may be shortly stated as follows, —

(1) As in the case where payment and conveyance are contemporaneous, if the purchaser has notice of a prior equitable estate or equity "*when he pays his money*" he takes subject to it, and cannot protect any equitable estate or interest which was purchased with such notice by subsequently acquiring the legal estate. In the leading case of *Le Neve v. Le Neve* (1747), Amb. 436, 1 Ves. Senr. 64, 3 Atk. 646 (p. 774, *post*), it was laid down by Lord HARDWICKE, according to the reports in Ambler & Atkins, "The taking of a legal estate after notice of a prior right makes a person a *malâ fide* purchaser, or as given in the report in 1 Vesey Sen., after notice of a prior right for valuable consideration." This is qualified by the authorities as stated in the next rule.

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(2) It is, however, a rule settled by authority, though often disapproved of, that if such a purchaser or mortgagee has not, when he pays his money, notice of the prior equitable estate or interest, and only himself obtains at the time of payment an equitable estate, he may subsequently, after notice of a prior equitable estate, protect himself by acquiring the legal estate from any person who can convey it without fraud or breach of trust. *Bailey v. Barnes* (C. A. 1893), 1891, 1 Ch. 25, 63 L. J. Ch. 73, 69 L. T. 542, 42 W. R. 66 (18 R. C. 507); *Taylor v. Russell* (10 R. C. 545), 1891, 1 Ch. and 1892, App. Cas. 244, 61 L. J. Ch. 657, 66 L. T. 565, 41 W. R. 53; *Blackwood v. London Chartered Bank of Australia* (1874), L. R. 5, P. C. see p. 111, L. J. Q. C. 25, 30 L. T. 45, 22 W. R. 419. See per Lord MACNAGHTEN in *Taylor v. Russell*, 1892, App. Cas. 244, 61 L. J. Ch. 657, 66 L. T. 565, 41 W. R. 43. "The mere fact that the subsequent encumbrancer has notice of the prior encumbrance when he gets in the legal estate counts for nothing." It is as Lord HARDWICKE says (2 Ves. 574), "The very occasion which shows the necessity for it."

There is a *dictum* of JAMES, L. J., in *Pilcher v. Rawlins*. See report, p. 737, *ante*, which seems to imply that the purchaser could protect himself by a legal estate, conveyed when the purchaser knew that the grantor could not convey it without a breach of trust; but this was not necessary for the decision, and is not law.

It is settled that where the legal estate is acquired subsequently to the payment of the purchase money, it will not protect the purchaser if at the time of acquiring it he has notice, actual or constructive, that the legal estate is affected with any trust for the owner of the prior equitable interest. *Saunders v. Dehew* (1692), 2 Vernon. 271; *Carter v. Carter* (1857), 3 K. & J. 617, 27 L. J. 74, 4 Jur. 25; *Mumford v. Stohwasser* (1874), L. R. 18 Eq. 556, 43 L. J. Ch. 694, 30 L. T. 859, 22 W. R. 833; *Maxfield v. Burton* (1873), L. R. 17 Eq. 15, as explained in *Garnham v. Skipper* (1885), 55 L. J. Ch. 263, 53 L. T. 940, 34 W. R. 135; *Harpham v. Shacklock*, 19 Ch. D. 207, 45 L. T. 569, 30 W. R. 49.

But the trust or equity, to affect the conscience of him who has got in the legal estate, must be a trust or equity not in favour of some person who has no care or desire to insist upon it, but a trust or equity in favour of the person against whom the legal estate is set up. See FRY, L. J., in *Taylor v. Russell* (1891), 1 Ch. p. 29.

The ruling case of *Pilcher v. Rawlins* (*supra*) shows that if the purchaser had obtained the legal estate at the time that he paid his money, he would have been protected, although the person conveying knew that he was committing a fraud or breach of trust in so doing. No decision to this effect has been given where the legal estate is acquired subsequently to the payment of the purchase money.

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And the cases leave the question open whether the purchaser is or not protected by a legal estate acquired subsequently to his purchase when the grantor knowingly commits a breach of trust or fraud in conveying it, though the purchaser has no notice of this. See the judgment of the Court of Appeal in *Bailey v. Barnes* (*supra*), the judgment of WRIGHT, J., in *Powell v. London & Provincial Bank*, 1893, 1 Ch. 610, 62 L. J. 795, 2 R. 482, 69 L. T. 421, 41 W. R. 545, where he gave a careful summary of the cases up to that date, and see per Lord HATHERLEY in *Bates v. Johnson* (1859), John. 304, 28 L. J. Ch. 509, 5 Jur. (N. S.) 842, 7 W. R. 512. See also *Allen v. Knight*, 5 Hare, 272, and the judgments of the Court of Appeal in *West London Commercial Bank v. Reliance Permanent Building Society* (1885), 29 Ch. D. 954, 54 L. J. Ch. 1081, and in *Taylor v. Russell* (*supra*). These judgments show that the question is open whether or not the purchaser is in such a case protected even if he pays value to the person conveying.

There is some authority for saying that though the purchaser has paid his money for an equitable interest without notice, he cannot protect himself by a legal estate subsequently obtained "without consideration" from a person committing a breach of trust in conveying it.

Thus in *Mumford v. Stohwasser*, *supra*, there is a *dictum* by JESSEL, M. R., that a person knowing he is a trustee cannot, "without receiving value at the time," by committing a breach of trust, convey an estate so as to deprive his own *cestui que trust* of his rights, and this *dictum* was clearly meant to apply to the case of a purchaser who had advanced his money and taken an equitable estate without notice of the trust. See also, as to such a case, the judgment of NORTH, J., in *Garrham v. Skipper* (1885), 55 L. J. Ch. 263, 53 L. T. 940, 34 W. R. 135, explaining the decision in *Murfield v. Barton* (1873), L. R. 17 Eq. 15, 22 W. R. 140, as depending on the fact that no consideration was given to the mortgagor for the legal estate, and apparently approving of the *dictum* that if no consideration is given by a subsequent mortgagee to the mortgagor for conveyance of the legal estate, it will be no protection to the subsequent mortgagee. See also *Prosser v. Rice* (1859), 28 Beav. 68.

See, however, *Goleborn v. Alcock* (1829), 2 Sim. 552. The ruling case of *Taylor v. Russell* (C. A. 1891, H. L. 1892), 10 R. C. 545 (1892, App. Cas. 244, 255), on equitable title, decided that a subsequent mortgagee who has advanced his money without notice of a prior equitable mortgage may protect his subsequent mortgage by a legal estate obtained without consideration from first mortgagees, whose mortgage was unsatisfied, but who held other property sufficient to

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answer their mortgage. This case, however, does not really touch the point in question, because it was expressly held that under the circumstances neither the first mortgagees, nor the persons to whom they conveyed, had become trustees for the mortgagor, see per Lord HERSCHELL in the report in (1892) A. C. 253, 255, where he distinguished the case from *Harpham v. Shacklock*, *supra*.

As regards land in Yorkshire, it must be remembered that the Yorkshire Registry Act of 1884, 47 & 48 Vict. c. 54, s. 14, excludes tacking, and the application of constructive notice, except in case of actual fraud; as to this, see *Battison v. Hobson*, cited in notes to *Le Nere v. Le Nere* (p. 810, *post*).

Plea of purchaser for value without notice by the holder of an equitable estate only. — The rules above stated are those applicable when the purchaser obtains the legal estate.

The ruling case of *Pilcher v. Rawlins*, *ante*, shows that though the legal estate be held by a trustee, a purchaser who gets an actual conveyance of it without notice of the trust, at the same time that he pays his purchase money, is protected by and entitled to hold it against the interests of the *cestui que trust*, and it was laid down in an old case that while the legal estate is outstanding in the trustee, "a purchaser without notice shall not be annoyed in equity, not only when he has a prior legal estate, but when he has a better right to call for the legal estate than the other." *Wilkes v. Bodington* (1707), 2 Vernon, 599.

The cases do not clearly define what "better right" is sufficient to bring the purchaser within this; but in the case cited of *Wilkes v. Bodington*, the trustees of the legal estate were parties to the deed of conveyance, and though they did not declare a trust for the purchaser, it was expressed to be "with their privity," and it appears from the judgment of Lord ELDON in *Maundrell v. Maundrell* (1805), 10 Ves. 270, and of WIGRAM, V.-C., in *Wilmot v. Pike*, 5 Hare, 14, that when the legal estate is vested in a trustee, if the purchaser obtains an express declaration of trust from the trustee, or implied by his being a party to the deed, the purchaser is, as against any equitable estate, treated as in the same position as if he had got the legal estate in himself.

It has also been laid down in the cases of purchasers of shares in limited companies, that a purchaser may come within this rule and have a better title to call for the legal estate if, in order to vest the legal estate, some purely ministerial act only remains to be done which, as between himself and company, the company would be bound to do forthwith; see per ROMER, J., in *Moore v. North Western Bank*, 1891, 2 Ch. 599, 60 L. J. Ch. 627, 64 L. T. 456, 40 W. R. 93, per Lord

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SELBORNE in *Société Générale de Paris v. Walker*, 11 App. Cas. 20-29; and *Dodds v. Hills* (1865), 2 H. & M. 424, 12 L. T. (N. S.) 139, and *Roots v. Williamson* (1888), 38 Ch. D. 497, 57 L. J. (Ch. 995, 58 L. T. 802, 36 W. R. 758.

LORD WESTBURY, in *Phillips v. Phillips* (1862), 10 R. C. 533-545, laid down that the plea might be maintained, as the law stood at that date, by an owner of an equitable estate in two other cases, discussed *ante* in the notes to *Ind, Coope & Co. v. Emmerson*.

There is a mixed case, partly legal, partly equitable. A transfer of a chose in action accompanied by a legal security such as a mortgage debt secured by a legal mortgage. Here the assignment of the mortgage debt may be treated as equitable, even if the debt passed at law under the Judicature Act, 1875, sect. 25, subsect. 6, as under that section it is to be subject to the same equities as if the Act had not been passed. The plea of purchase for value does not apply in this case.

This was discussed in the recent case of *Dixon v. Winch* (1899), 47 W. R. 620, 81 L. T. 111, before COZENS-HARDY, J., and affirmed on appeal 44 Sol. J. p. 327. COZENS-HARDY, J., said: "It is well settled that where a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer, *Matthews v. Wallwyn*, 4 Ves. 118; and it is also settled that payments of interest or payments on account of principal made by the mortgagor to the mortgagee, after, but without notice of a transfer, must, in the absence of collusion, be allowed to the mortgagor as against the transferee. *Williams v. Sorrell*, 4 Ves. 389. This doctrine has been extended to the case where the whole mortgaged debt is, under similar circumstances, paid off. See *Norrish v. Marshall*, 5 Madd. 475; *Allen v. Lord Southampton*, 29 W. R. 231, 16 Ch. D. 178." The legal estate is no protection in these cases, see per LORD CHANCELLOR, *Mangles v. Dixon* (1852), 3 H. L. C. 737.

These cases only go to the state of account, and there is some doubt on the authorities what other equities will affect a transferee getting a legal estate. See the *Encyclopedia of the Laws of England*, vol. 8, pp. 496-497.

AMERICAN NOTES.

That a purchaser who not only pays the purchase money, but also takes a conveyance of the legal title, without notice of any equity, is protected, is clear. "When the legal title is obtained at the time of the purchase, nothing can be clearer than that the purchaser without notice is entitled to priority in equity as well as at law, according to the maxim that where equities are equal the law will prevail." Bispham, *Principles of Equity*, 6th ed. sect. 264, citing the principal cases.

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The effect of receiving notice after the conveyance, but before payment of the consideration, has been considered in the notes to the preceding rule.

The question as to the rights of one who pays for a piece of property, but receives notice of an equity before he obtains the title, presents more difficulty. On this point the American authorities are by no means uniform. "The case of notice received after payment made, but before the deed of conveyance delivered, has given rise to a direct conflict of judicial opinion. One group of decisions adopts and lays down the English rule, that the purchase, under these circumstances, is not *bonâ fide*. Another line of cases holds, in the most positive and general manner, that where the purchaser has paid the consideration without notice of any prior claim, and after receiving notice he obtains a conveyance of the legal estate, he becomes to all intents a *bonâ fide* purchaser, and is entitled to all the protection belonging to that position. And this result seems to be applied without limitation to the acquisition of every kind of equitable estate, interest, or right." 2 Pomeroy, *Equity Jurisprudence*, 2nd ed. sect. 755, citing cases on both sides.

Cases holding that a purchaser who receives notice of an equity before he acquires the title may nevertheless take the legal estate and claim protection as a *bonâ fide* purchaser are *Campbell v. Brackenridge*, 8 Blackford (Ind.), 471; *Carroll v. Johnston*, 2 Jones Eq. (N. Car.) 120; *Gibler v. Trimble*, 14 Ohio, 323; *Leach v. Ansbacher*, 55 Pennsylvania State, 85. Thus in *Carroll v. Johnston*, *supra*, where the plaintiff claimed under A., a vendee of certain property, and the defendant was a subsequent vendee of the same property, who had paid part of the price before learning of A.'s claim, and who, after receiving notice, had obtained a conveyance from the vendor, the Court held that the defendant was entitled to protection as a *bonâ fide* purchaser. Of which decision Mr. Pomeroy says: "Certainly there is nothing in the settled principles of the doctrine concerning *bonâ fide* purchase which can sustain such a conclusion." 2 Pomeroy, *Equity Jurisprudence*, 2nd ed. sect. 755, n. 4.

The following are some of the cases in which a contrary view has been taken, and it has been held that a purchaser is not protected from a prior equity if he receives notice of it at any time before the conveyance is executed, although he may have paid the purchase money before notice. *Vattier v. Hinde*, 7 Peters (U. S. Sup. Ct.), 252; *Louisville & Nashville R. Co. v. Bogkin*, 76 Alabama, 560; *Duncan v. Johnson*, 13 Arkansas, 190, 192; *Corn v. Sims*, 3 Metcalfe (Ky.), 391; *Grimstone v. Carter*, 3 Paige (N. Y.), 421; *Peabody v. Fenton*, 3 Barbour Chanc. (N. Y.) 451, 464-465. Other cases are collected in Ames, *Cases on Trusts*, 2nd ed. p. 288; 2 Pomeroy, *Equity Jurisprudence*, 2nd ed. sect. 755.

In *Louisville & Nashville R. Co. v. Bogkin*, *supra*, it was held that where two purchasers of land claim from the same vendor, the deed to each being inoperative as a conveyance, though founded on a valuable consideration, and valid as an agreement to convey, the junior purchaser cannot, by procuring a conveyance of the legal title, defeat the superior equity of the senior, of which he had notice, actual or constructive. The Court said: "Whatever may be the conflict of judicial opinion, and however irreconcilable, the rule is settled in this state, — has become a rule of property which we are not at

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liberty to disturb, — that a Court of equity will not permit the party, having the subsequent equity, to protect himself by obtaining a conveyance of the legal title, after he has either actual or constructive notice of the prior equity." *Flash v. Ruceesies*, 32 Alabama, 451."

In *Grimstone v. Carter*, *supra*, Chancellor WALWORTH thus stated the doctrine: "Nor will this Court permit the party having the subsequent equity to protect himself by obtaining a conveyance of the legal title, after he has either actual or constructive notice of the prior equity. . . . To protect a party, therefore, and to enable him to defend himself, as a *bonâ fide* purchaser for a valuable consideration, he must aver in his plea, or state in his answer, not only that there was an equal equity in himself, by reason of his having actually paid the purchase money, but that he had also clothed his equity with the legal title before he had notice of the prior equity."

So it has been held that "if a bill negotiable only by indorsement is transferred by delivery merely to a purchaser for value without notice, but is not indorsed to him until after he has been notified of an equity attaching to the bill, the indorsee will acquire only the rights of his transferor." Ames, Cases on Trusts, 2nd ed. p. 289; *Savage v. King*, 17 Maine, 301; *Lancaster Nat. Bank v. Taylor*, 100 Massachusetts, 18; *Southard v. Porter*, 13 New Hampshire, 379; *Goshen Nat. Bank v. Bingham*, 118 New York, 349. *Contra*, *Baggarly v. Galtier*, 2 Jones Eq. (N. Car.) 80.

In *Goshen Nat. Bank v. Bingham*, 118 New York, 349, the cashier of a bank was induced by fraud to certify a check of one B., payable to B.'s order. B. presented the certified check, unindorsed, to the plaintiffs, who cashed it. While they held it thus unindorsed, they were notified by the bank of the fraud. Subsequently obtaining an indorsement by B, they sued the bank on the check, but the Court held they were not entitled to recover.

On the general question, Mr. Bispham says that it is "well settled that where the purchaser without notice does not acquire the legal title at the time of his purchase, but subsequently gets it, he is entitled to avail himself of it as a defence to an equity, provided he does not, by that act, become a party to a breach of trust; because, as the equities of both parties are equal, there is no reason why the purchaser should be deprived of the advantage he may obtain at law by superior activity and diligence. This is the common doctrine of the *tabula in naufragio*." Principles of Equity, 6th ed. sect. 264.

Mr. Pomeroy discusses the question in a different manner, and treats it fully and ably. After referring to the lack of harmony in the American decisions, he says: "An attempt to reconcile these conflicting authorities would be vain. I can only state what seem to be the necessary conclusions from well-established equitable principles. In the first place, the rule last stated [that one obtaining legal title after notice may claim protection as a *bonâ fide* purchaser] cannot be extended to all equitable interests without violating elementary principles. Between two successive equal equities, the order of time controls, without regard to the fact of consideration or notice: the one subsequent in time obtains no preference by paying consideration without notice. Equities are thus equal where both parties are equally innocent and equally diligent. If an owner of land gives an agreement to

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convey it to A., who pays all or part of the price, and afterwards gives a second agreement to convey to B., who enters into the contract and pays all or part of the price without any notice of the prior claim of A., clearly B. would have obtained no equitable advantage from the fact of his contract and payment without notice; A.'s interest would be of the same character and extent, and his priority of time would give him priority of right. To say that B., being thus inferior in equitable right, may, upon receiving notice of A.'s contract, obtain a conveyance from the owner, and thus establish a precedence over A., is to misapply the doctrine of *bonâ fide* purchase, and to ignore a familiar principle of equity that one who acquires a title with notice of a prior equity takes it subject to that equity. The same is true of all subsequent equitable interests, liens, and claims not arising from conveyances or instruments which purport to be conveyances of the entire estate. This conclusion is fully sustained by the ablest authorities, English and American. In the second place the English decisions are numerous to the effect that when one has purchased an equitable *estate*, and has received the instrument conveying the same, and paid the entire consideration without notice of a prior conflicting claim, he may, upon receiving notice thereof, procure a transfer of the outstanding legal title, and thereby obtain protection. This mode of *bonâ fide* purchase, it will be found, is strictly confined to cases in which the purchaser acquires an *estate*, although equitable, and therefore acquires and holds through an instrument which purports to be and operates as a conveyance of the land. The most common example is that of a subsequent mortgagee of land, through a mortgage in the ordinary form of a legal conveyance, where his estate is necessarily equitable, since the legal estate has been conveyed to and is outstanding in the first mortgagee. The true force and effect of these English decisions have sometimes, I think, been misapprehended by American Courts. The only conclusions consistent with settled principles are the following. It is only where a party has acquired an equitable *estate* by means of a conveyance which purported to convey the land itself, and has received the instrument and paid the consideration without notice of a prior claim, that he can, after notice, procure the legal title and with it the protection of a *bonâ fide* purchaser. Where a party has acquired only an equitable lien or interest, not by conveyance, and has advanced the consideration without notice, he cannot, after notice, get in the legal estate, and thus obtain precedence over a prior equity." *Equity Jurisprudence*, 2nd ed. sect. 756.

In 1 *Harvard Law Review*, 1, there is a valuable article by Professor Ames on "Purchase for Value without Notice." At p. 5, the author says: "An honest purchaser will, furthermore, be protected, although he did not obtain the legal title at the time of his purchase, if he did acquire at that time an irrevocable power of obtaining the legal title upon the performance of some condition, and that, too, although before performance of the condition, he received notice of the prior equitable claim. Thus, if a trustee, in violation of his duty, should sell the trust property to one who had no notice of the trust, and should deliver the deed in escrow, the defrauded *cestui que trust* could not restrain the innocent purchaser from performing the

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condition, nor could he obtain any relief against him after he had acquired the title. On the same principle one who acquired at the time of his purchase an irrevocable power of obtaining the legal title upon the performance of some act by a third party, which that party is in duty bound to perform, will be as fully protected as if he had acquired the title itself at the time of his purchase." Citing *Brewster v. Sime*, 12 California, 139; *Thompson v. Toland*, 48 California, 99, 112; *Winter v. Belmont*, 53 California, 428; *Atkinson v. Atkinson*, 8 Allen (Mass.), 15; *McNeil v. Tenth Nat. Bank*, 46 New York, 325; And in a note on p. 6, Professor Ames adds: "If the lender required the performance of some further act on the part of the trustee in order to complete his title, and if before such performance he received notice of the trust, the loss would fall upon him; for in the case supposed he could not obtain the title without making himself a party to the continuance of the breach of trust."

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(1881.)

RULE.

A PURCHASER of land (including a mortgagee or lessee) who completes the purchase by taking a conveyance without actual notice is affected with constructive notice of all that he would have discovered if he had required the usual title.

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17 Ch. D. 353-360 (8. C. 50 L. J. Ch. 642; 44 L. T. 728; 29 W. R. 707).

353 *Lessor. — Lessee. — Restrictive Covenant. — Constructive Notice. — Lessor's Title.*

A purchaser or lessee having notice of a deed forming part of the chain of title of his vendor or lessor, has constructive notice of the contents of such deed, and is not protected from the consequences of not looking at the deed, even by the most express representation on the part of the vendor or lessor that it contains no restrictive covenants, nor anything in any way affecting the title.

The rule that a lessee has constructive notice of his lessor's title has not been altered by sect. 2, sub-sect. 1, of the Vendor and Purchaser Act, 1874, but a lessee is now in the same position with regard to notice as if he had, before the Act, stipulated not to inquire into his lessor's title.

Motion. By an indenture dated the 25th of October, 1876, the plaintiff conveyed to one Hervé two freehold plots of land, being

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parts of a building estate at Wimbledon, subject, nevertheless, to the restrictions and obligations as to building and other matters contained in an indenture of mutual covenants, also dated the 25th of October, 1876, executed by the plaintiff and Hervè, and the purchasers of other building plots, part of the same estate. One of the covenants contained in the latter deed provided that on the several plots private dwelling-houses only should be erected.

By an indenture dated the 18th of July, 1878, Hervè conveyed the same two plots of land to the defendant Harland, subject to the same restrictions and obligations as to building by reference to the deed of mutual covenants, as were contained in the conveyance to Hervè.

The defendant Harland having erected a dwelling-house on the property, by an indenture dated the 29th of March, 1881, demised it to the defendant Louisa Bennett for the term of seven years, for the purposes of an "Art College," and the lease contained a proviso that the defendant Bennett, her executors, *admin- [*354] istrators, or assigns, should be at liberty to erect in the garden belonging to the premises a studio, with necessary rooms connected therewith, of corrugated iron on a brick foundation, and a covenant by the lessee not to carry on any trade, business, or employment, on the premises, without the consent in writing of the lessor, but to use the premises as a private dwelling-house only, with a proviso, however, that the user of the premises for the purpose of a school for instruction in art or otherwise should not be deemed a breach of any covenant in the lease.

Neither the defendant Bennett nor her solicitor was informed or was aware before the execution of the lease, nor till shortly before the issuing of the writ in the action, that there was any restrictive covenant affecting the land, and she had proceeded to erect the studio which was nearly completed.

This was a motion for an injunction to restrain the defendants from erecting, or continuing to erect, or permitting any building or buildings, other than private dwelling-houses, to remain on the land, and in particular, the building then in the course of erection.

Ince, Q.C., and Shebbeare, in support of the motion:—

The erection of the art studio is a clear breach of the covenant. It is not a private dwelling-house in any sense of the word, nor an adjunct to one; it is a separate and distinct building, but the principal question is, whether, under the circumstances, the de-

defendant Bennett is bound by the restrictive covenant as to building, and as to that, we say that she must be taken to have had constructive notice of the restrictive covenant. She was bound to inquire into her lessor's title. It is not necessary that she should have express notice. A lessee has constructive notice of everything affecting his lessor's title. *Fielden v. Slater*, L. R. 7 Eq. 523.

Byrne, for the defendant Bennett:—

We had no constructive notice of this restrictive covenant. We had no reason to suspect that any such covenant existed, and the fact that we were not informed of this restrictive covenant when we took the lease, coupled with the fact that a proviso that [*355] we might erect the studio was inserted in the lease, amounted to a representation that there was no such restrictive covenant. If there was such a representation, then according to the *dictum* of Lord Justice TURNER in *Wilson v. Hart*, L. R. 1 Ch. 463, the Court will not enforce the covenant against the defendant Bennett. Having this representation made to her, there was no obligation upon her to make inquiries, and she was not bound to inquire into the landlord's title: *Carter v. Williams*, L. R. 9 Eq. 678, and *Jones v. Smith*, 1 Hare, 43, 1 Ph. 244, are in our favour.

Crossley, Q.C., and Simmonds, for the defendant Harland, submitted that he was not a necessary party to the action, and argued that the studio being erected in the garden of the dwelling-house was within the curtilage, and could fairly be said to be an adjunct to the house, and, therefore, did not fall within the covenant.

JESSEL, M.R. :—

I must say that on the point of law I have a very clear opinion, and not the less so because there are *dicta* in the books which at first sight appear to lead to a different conclusion. I say at first sight, because, when carefully examined, they do not bear out the argument which has been supposed to be fortified by them.

The first question I have to consider is the notice which a man who takes a lease has of his lessor's title. It has been settled for more than a century that he has constructive notice of his lessor's title. Lord ELDON treated it as settled law. That means this, that the man who takes a lease is in a similar position as regards constructive notice as a man who buys. There could not be any

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reason for any distinction between purchasing a fee simple and taking a lease for 10,000 years. If a man who purchases a fee simple is bound to look into the title in a regular way, so is a man who takes a lease for 10,000 years, or 1900 years, or for 100 years, or any lease at all, bound to make reasonable inquiry into his lessor's title. Well, what is reasonable inquiry? It has been * held that he is to require the usual title, what- [* 356] ever the usual title may be.

In this case the lessor's title began in 1878, and if the lessee had only asked to see the conveyance to the lessor, that is without going back forty years, she would have found that it was subject to this restrictive covenant, because the grantor in 1878 took care to convey the land, subject to the covenants, though the covenants themselves were in a separate deed.

Now it is not to be supposed that I am going to restrict the doctrine to looking at the actual conveyance — not at all — because that would be to destroy it altogether. If the lessor had a conveyance made to him the day before that would not do, the lessee must ask for the conveyance to him and a fair and reasonable deduction of title. In this case, as I said before, the actual conveyance refers to this covenant, but if it had not shown it, I should have come to the same conclusion, as the conveyance of 1876 referred to it, and that must have appeared on any investigation of title.

The result, therefore, is, the lessee had constructive notice. Now it has been argued that if the lessee, having this constructive notice, was told by the lessor that there was no restrictive covenant, that representation would in equity do away with the effect of constructive notice. I entirely dissent from that proposition. Constructive notice of a deed is constructive notice of its contents, subject to what I am going to say presently. If, therefore, you have notice of a deed relating to the title, and forming part of the chain of title, you have notice of the contents of that deed, and it is no excuse for not asking to look at it to say you were told that the deed contained nothing which it was necessary for you to look at, otherwise in every case you might be satisfied with a statement of the contents of a deed without going to look at it. Of course there may be cases where the deed cannot be got at, or for some other reason, where, with the exercise of all the prudence in the world, you cannot see it, and then there may be no constructive notice affecting the title, but that is another question.

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Where you know of a deed it is no answer to be told that it does not prejudicially affect the title, as if it does affect the title you are bound by its contents. There is a class of cases, of [* 357] which I think *Jones v. * Smith*, 1 Hare, 43, 1 Ph. 244, is the most notorious, where the purchaser was told of a deed which might or might not affect the title, and was told at the same time that it did not affect the title. Supposing you are buying land of a married man, as in *Jones v. Smith*, and you are told at the same time that there is a marriage settlement, but the deed does not affect the land in question, you have no constructive notice of its contents, because although you know there is a settlement you are told it does not affect the land. If every marriage settlement necessarily affected all a man's land, then you would have constructive notice; but as a settlement may not relate to his land at all, or only to some other portions of it, the mere fact of your having heard of a settlement does not give you constructive notice of its contents, if you are told at the same time it does not affect the land. I take it, under the modern practice, you are not bound to inquire, because the abstract furnished you is an abstract of every document affecting the land, and although you have been told that the man made a marriage settlement, you are not entitled to assume that the solicitor suppressed improperly the deed of settlement. I take it, if you asked for it, he might say "It has nothing to do with you." But that line of cases has no bearing at all on a case where you know the deed does affect the land, and the question as to the extent to which it does affect the land is to be ascertained only by looking at the deed itself. Therefore you have no right to rely on the statement of somebody else that the deed which you can look at does not contain something which it does in fact contain.

I have said so much on this point because there is no doubt an observation which was let fall by Lord Justice TURNER in *Wilson v. Hart*, L. R. 1 Ch. 463, and which does to some extent countenance the contrary doctrine; but as regards the case of *Carter v. Williams*, L. R. 9 Eq. 678, before the Vice-Chancellor JAMES, that, as I read it, entirely confirms my view. It is not fair to criticise the words used by the VICE-CHANCELLOR, but when you look at the argument addressed to him you see the objection there was that the covenant was contained in a collateral deed, which was not recited. In *Coles v. Sims*, 5 D. M. & G. 1,

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cited in *Carter v. Williams*, the restrictive covenant was *recited in the conveyance. The VICE-CHANCELLOR in [* 358] *Carter v. Williams* says that the covenant is contained in a separate deed, but what he means is this, that the deed is not noticed either by way of recital or by being referred to in the deed of conveyance, so that a person might get a complete chain of title without any notice of that deed. That is what he means, and that being so, of course if the tenant had asked for his lessor's title, and got it, he would not necessarily have got that information. The solicitor ought no doubt to have put it in the abstract if he knew of it, but he would not necessarily know of it. Then the VICE-CHANCELLOR came to the conclusion that there being no evidence of anything to bring home to the tenant actual knowledge or notice of the restrictive covenant he could not hold he had constructive notice of it. Therefore, it appears to me, that case rather follows out the doctrine of *Jones v. Smith*, and by no means affects the other cases cited where the document in question affecting the title is recited or otherwise noticed in the title-deeds. In *Carter v. Williams*, any one could have accepted the title without being aware of the document containing the covenant.

I am therefore of opinion that the constructive notice which the lessee in this case obtained, would not have been done away with by the most express statement obtained from the lessor that there was no restrictive covenant. I must say that I am not satisfied in this case that there was any such representation. What appears to have occurred was this, the lessor did not of course show his title, but he was aware that the lessee intended to use this property in the way she attempts to use it, and there was a proviso which excepted such user from the covenant in the lease, and consequently a person reading that lease would have assumed, and fairly assumed, that she had a right to use it in the way mentioned in the exception from the covenant. In that way there was a representation — an indirect representation — and there were in addition to that some further words in the lease which tended in the same direction. Therefore I think there was sufficient to put the lessee off her guard, if I may say so, if it were not that she had constructive notice, the effect of which no representation could have destroyed.

* I wish to notice one other point; it is said that the [* 359]

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new law as to the extent of title to be required by purchasers alters the rule. I think it does not: what the Vendor and Purchaser Act does is this, in order that a lessee may obtain his lessor's title, it makes an express stipulation to that effect necessary, whereas formerly the rule was the other way, that without express stipulation the lessee had a right to the title. Formerly, if the lessee had expressly stipulated not to look into his lessor's title, it would not have affected the constructive notice. This is the meaning of the doctrine; you may bargain to shut your eyes, but if you do wilfully shut your eyes, whether as a bargain or not, you must be liable to the consequences of shutting your eyes. If, therefore, the lessee had formerly expressly bargained to take a lease without looking into the lessor's title, the lessee would have been bound by constructive notice, and now if the lessee says nothing it is exactly the same as if formerly he had bargained expressly not to look into the lessor's title. Therefore, as he may refuse to take a lease without looking into the title (in some cases, especially in the case of building leases, lessees do look into the title, in other cases they do not), it appears to me that the law is unaltered, and that the doctrine of *Tulk v. Moxhay*, 2 Ph. 774, and that line of cases applies.

Then the lessee being bound by the covenant, the only remaining question is, What is the covenant, and has there been a breach of it? The covenant is not well worded, and will not perhaps carry out the full intention of the covenantee, but it is a covenant that they "shall erect private dwelling-houses only" on the piece of land. The lessee is building something which it would be rather absurd for any one to describe as a private dwelling-house, and I am glad to see that nobody does so describe it; it is described in the affidavit as a corrugated iron building, not in any way connected with the dwelling-house, or so situated at present as possibly to be used for a private dwelling-house. The lessee says it has been built as an addition to the house which is intended to be used as an art studio for ladies. There is no question that it has been erected for that purpose, and not for a private dwelling-house. It has been argued that this building, being within the same curtilage as the house, must be treated as [*360] *appurtenant to the dwelling-house, and forming part of it, in the same way as a billiard-room or smoking-room might be. But this is a thing of a totally different character. It

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could not be suggested that having built a private dwelling-house with a garden, if you then built a church or chapel at the other end of the garden, that church or chapel would be treated as a portion of the private dwelling-house, merely because it happened to be within the same curtilage — it would be a separate erection and not a private dwelling-house. It is in my opinion a clear breach of the covenant, and being so I shall restrain the further proceeding with its construction, which is all I think it right to order now, though if it is not taken away altogether before the trial of the action I may order it to be taken away then. The lessee has, I think, a right to convert the building if she can into a fair and reasonable adjunct to the private dwelling-house; that is the reason I do not now grant the mandatory injunction asked for. I shall not grant any injunction against the defendant Harland, and his costs and the costs of all other parties will be costs in the action.

ENGLISH NOTES.

The general rule laid down in *Patman v. Harland* that a purchaser is affected with notice of what he would have discovered in investigating the usual title was well established by earlier decisions. See *Wilson v. Hart* (1865), L. R. 1 Ch. 463, 14 L. T. (N. S.) 499; *Robson v. Flight* (1865), 4 De G. J. & Sm. 608.

The case is cited as a ruling case, not only on account of the clear statement of the law and the distinction between notice of deeds which must necessarily affect the title, and of those which need not necessarily affect it, but also because of its application to leaseholds coming within the provision of the Vendor and Purchaser Act, 1874, sect. 2, that, in the absence of express contrary stipulation, each contract shall imply that the purchaser shall not require evidence of the lessor's title. Apart from authority, it would seem questionable whether the doctrine as to constructive notice through not investigating title should apply to a leasehold within this Act. To hold that it does apply seems to make that statute imply a form of contract which the Courts hold it is negligent for a purchaser to adopt. On the other hand if it had been held that the doctrine of notice from not investigating title did not apply, a lessor or former owner might be deprived of a right appearing on a recent title deed.

It is also to be noticed that *Patman v. Harland* was decided in 1881, and therefore before the passing of the Conveyancing Act, 1882; sect. 3 of which provides that a purchaser shall not be affected by

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constructive notice of anything unless it is within his own knowledge; or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him or his agent.

Patman v. Harland has, however, been followed by the Court of Appeal in cases since the Act of 1882, see *Imray v. Oakshette*, 1897, 2 Q. B. 218, 66 L. J. Q. B. 544, 76 L. T. 632, 45 W. R. 69, an important case as to constructive notice. In this case, the purchaser purchased an underlease for eighteen and three-fourths years under a contract which gave no special power to investigate the underlessor's title, and therefore, under sect. 3, sub-sect. 1, of the Conveyancing Act of 1881, extending to underleases the provision of the Vendor and Purchaser Act, 1874, he could not investigate the underlessor's title. It appeared that the purchaser of the underlease intended to spend, and did spend, £500 on the property. It appeared subsequently that the original lease, which was for twenty-one years, contained a covenant against assigning without licence, and on the original lessor claiming to re-enter for breach of this covenant, an application was made to the Chancery Division for relief against the forfeiture, under the powers conferred by the Conveyancing Act, 1881, sect. 14 and sect. 4 of the amending Act of 1892 (55 & 56 Vict. c. 13).

The Court of Appeal held that the purchaser of the underlease had been guilty of such negligence in entering into his contract without excluding the provision in sect. 3, sub-sect. 1, of the Conveyancing Act, 1881, by which he was precluded from investigating the title, that relief against the forfeiture should not be granted to him. RIGBY, L. J., in giving judgment, said, "as pointed out in *Patman v. Harland* (17 Ch. D. 353), that (*i. e.* not investigating the lessor's title) is reasonable where a man is taking a mere occupation lease; but if he is intending to spend money on the premises, for instance, if he is taking a building lease for a thousand years, would it be rational or reasonable in him to adopt that statutory form of contract. The answer is, No, he ought to say, 'Notwithstanding that statute, I must have a reasonable production of the documents relating to the title.' . . . 'Constructive notice then is exactly the same thing as express notice for any purpose we have to deal with. Here is a gentleman proposing to take an underlease and bargaining that he would not investigate the title although he was going to spend money on the property. I think I might stop there and say that he has no case.' " In *Mogridge v. Clapp* (C. A.), 1892, 3 Ch. 382, 61 L. J. Ch. 534, 67 L. T. 100, 40 W. R. 663, the decision in *Patman v. Harland* had been approved of by the Court of Appeal. In this case a building lease for ninety-nine years was granted by a person purporting to demise as absolute owner, and it turned out that he was

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only tenant by the curtesy that the property had belonged to his wife in fee under a will, and that there were no trustees of it.

It was held by the Court of Appeal, affirming Mr. Justice KEKEWICH, that on the authority of *Patman v. Harland*, the lessee had constructive notice that the lessor had only an estate by the curtesy, and also of the will under which his estate was taken, but that there might have been trustees for the purpose of the Settled Land Act, and that the lessor might have granted the lease under the provisions in that Act, and that the lease was therefore to be taken as valid under those powers, and the lessee was not affected with notice that there were no trustees.

Mogridge v. Clapp is important both as confirming the decision of *Patman v. Harland*, and also as showing that the Courts are unwilling to affect a purchaser from a tenant for life with constructive notice of any omission by him to observe the conditions imposed by the Settled Land Acts under sect. 45 of the Settled Land Act of 1882, the tenant for life, before granting a building lease, is bound to give notice to the trustee of the settlement; but the lessee or purchaser is not bound to see that notice is given.

And LINDLEY, L. J., said, "Even if the plaintiff had known that there were no trustees, it would not follow that his title would be bad. Of course if the plaintiff had, by conniving at a breach of trust, done the remainderman an injury, he would personally be liable to him for it; but even then a purchaser from him would, I think, be safe." *Patman v. Harland* has been approved of in other cases, see *In re Cor & Neece's Contract*, 1891, 2 Ch. 109, and *Gainsborough v. Watcombe Terra Cotta Clay Co.* (1885), 53 L. T. 116, 54 L. J. Ch. 991; *Garnham v. Skipper* (1885), 53 L. T. 940, which last three mentioned cases, however, did not turn on the provisions of sect. 2 of the Vendor and Purchaser Act, 1874, or sect. 3 of the Conveyancing Act, 1881.

A distinction is taken in the cases when land is the subject of a statutory register, and when it is not, if the question is between a subsequent purchaser taking under a duly registered deed, and a prior equitable owner taking under an unregistered deed. In the recent case of *Oliver v. Hinton* (*infra*, p. 764), ROMER, J., distinguished *Agra Bank v. Barry* (p. 784, *post*), on the ground that it related to land subject to a register; and it is to be observed that in *Patman v. Harland*, the land was not subject to any statutory register. In the notes to *Agra Bank v. Barry* (p. 784, *post*), the position is discussed of a person taking under a registered deed, land subject to statutory provision as to registry, when a claim is made to postpone him for negligence or notice to an encumbrancer under an unregistered deed.

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Assuming that the decisions are correct, with respect to land not subject to a register, that a purchaser of a lease is affected with notice of the lessor's title, it still seems an hardship that if a purchaser adopts a form of contract which the Legislature has declared to be binding on vendor and purchaser, unless they expressly exclude the operation of the Act, the Courts should hold that the purchaser acts so negligently and unreasonably that he loses any claim to that relief against a forfeiture which is provided for reasonable persons. *Imray v. Oakshette*, 1897, 2 Q. B. 218, 66 L. J. Q. B. 544, 76 L. T. 632, 45 W. R. 69.

The position is the more curious inasmuch as the Act, by sect. 3, authorises trustees to buy without excluding the 2nd section, and the doctrine of notice from negligence in not making inquiries, on the theory that the purchaser abstained from inquiry purposely to avoid notice, though later cases, cited *infra*, qualify this.

The authority frequently referred to is *Jones v. Smith* (1841), 1 Hare. 43: LINDLEY, L. J., referring to this in the ruling case of *Bailey v. Barnes* (see 18 R. C. p. 519), says, "In the celebrated judgment of Vice-Chancellor WIGRAM, in *Jones v. Smith*, the cases of constructive notice are reduced to two classes: the first comprises cases in which a purchaser has actual notice of some defect, inquiry into which would disclose others, and the 2nd comprises cases in which a purchaser has purposely abstained from making inquiries for fear he should discover something wrong." The VICE-CHANCELLOR proceeds (at page 56 in the report in 1 Hare), after the passage referred to by LINDLEY, L. J., "If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of the facts which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser, there the doctrine of constructive notice will not apply; there the purchaser will in equity be considered, as in fact he is, a *bonâ fide* purchaser without notice."

A similar conclusion seems to be supported by the cases which are discussed by FRY, L. J., in the ruling case of *Northern Counties of England Fire Insurance Co. v. Whipp*, reported in full in 10 R. C. 516, see pp. 488-492, in the report in 26 Ch. D. 482, and pp. 520-527, where FRY, L. J., delivering the judgment of the Court of Appeal, examines several old cases in order to determine what amount of negligence will postpone the holder of a legal estate; that case involved directly only a question of negligence of a mortgagee in allowing deeds to go out of his possession, but the Judge discusses the doctrine of negligence in not inquiring for deeds and investigating title, and adopted the statement of the law by Lord SELBORNE, in *Agra Bank v. Barry* (1874),

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L. R. 7 II. L. 135, 157 (p. 805, *post*), in the words following: "It has been said in argument that investigation of title and inquiry after deeds is the 'duty of' a purchaser, but this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing *bonâ fide* in the proper and usual manner for his own interest ought by himself or his solicitor to follow with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with *bonâ fide* dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation, must always be a question to be decided with reference to the nature and circumstances of each particular case;" as stated in these cases, the equitable doctrine of constructive notice would seem not to go further than the common-law doctrine of inferring *malâ fides*.

They show, however, that where a person has obtained a legal estate, and in the case of land in a registered county of a registered conveyance, a greater amount of negligence must be shown to postpone him to an equitable or unregistered interest than would be necessary in the case of an equitable one.

In *Ratcliffe v. Barnard* (1871), L. R. 6 Ch. 652, 19 W. R. 340, relating to land not subject to any register, a prior equitable mortgagee claimed that a subsequent mortgagee who had obtained the legal estate without notice should be postponed by constructive notice because his solicitor had not examined a parcel of deeds which purported to, but did not contain all the deeds, Lord Justice JAMES said, "The Lord Justice TURNER has, in *Hunt v. Eames*, 2 D. F. & J. 578, 7 Jur. (N. S.) 200, enforced the only principle upon which, in this Court, a man will have his legal security taken away. He must have been guilty of fraud or of that wilful negligence which leads the Court to conclude that he is an accomplice in fraud."

In the most recent case, however, of *Oliver v. Hinton*, 1899, 2 Ch. 264, 68 L. J. Ch. 583, 48 W. R. 3, 81 L. T. 212, the Court of Appeal, affirming the judgment of ROMER, J., referred to and disapproved of this passage of the judgment of JAMES, L. J. LINDLEY, M. R., said: "He (the purchaser's agent) inquired about the title deeds and was told by Hill (the mortgagor) that they were in his possession, but that they would not be delivered up to the purchaser because they related also to other property. No abstract of title was asked for or delivered, and no further inquiry was made. . . . Can a person whose agent acted in this way be regarded as a *bonâ fide* purchaser for value without notice who is entitled to the protection of the legal estate? To allow a purchaser who acts with such gross carelessness to deprive a prior inno-

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cent mortgagee of her priority would be the greatest injustice. None of the cases which have been cited really assist the defendant, with the exception of *Ratcliffe v. Barnard*, L. R. 6 Ch. 652. The actual decision in that case was, I think, perfectly right; but I think that JAMES, L. J., went too far in the language which he used. He said (L. R. 6 Ch. App. 652). TURNER, L. J., has in *Hunt v. Elmes*, 2 D. F. & J. 578, expressed the only principle upon which in this Court a man will have his legal security taken away. He must have been guilty of fraud or of that wilful negligence which leads the Court to conclude that he is an accomplice in the fraud. If a man abstains from inquiry under such circumstances that the Court will infer that he abstained in order to deprive himself of knowledge, then he will not be allowed to hold the property, merely because he did not inquire. I am not prepared to go to that length, and I do not think what JAMES, L. J., said is justified by the case of *Hunt v. Elmes* (*supra*) to which he referred. In that case and also in *Hewitt v. Loosemore*, 9 Hare, 449, 21 L. J. Ch. 69, it was said that to deprive a man of the protection of the legal estate he must have been guilty of either fraud or gross and wilful negligence. To deprive a purchaser for value without notice of a prior encumbrance of the protection of the legal estate it is not, in my opinion, essential that he should have been guilty of fraud; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior encumbrancer of his priority."

This carries the doctrine also beyond that in *Jones v. Smith* (*supra*); see the report in 1 Hare, at p. 71, in 1841, Vice-Chancellor WIGRAM says: "I may observe that the distinction between negligence and *mala fides* is now firmly established at law. 'Gross negligence (says Lord DENMAN in *Goodman v. Harvey*, 4 Ad. & Ell. 876) may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine.' The doctrines of law and equity upon this point ought to be concurrent." As to this see the case of *English and Scottish Mercantile Investment Co. v. Bruntton* (C. A.), 1892, 2 Q. B. 700, 67 L. T. 406, 41 W. R. 133, where Lord ESHER, M. R., says: "The doctrine of constructive notice is wholly equitable; it is not known to the common law. There is an inference of fact known to common lawyers which comes somewhat near to it. When a man has statements made to him, or has knowledge of facts which do not expressly tell him of something which is against him, and he abstains from making further inquiry because he knows what the result would be — or, as the phrase is, he 'wilfully shuts his eyes' — then Judges are in the habit of telling juries that they may infer that he did know what was against him. It is an inference of fact drawn because you cannot look into a man's mind, but you can

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infer from his conduct whether he is speaking truly or not when he says he did not know of particular facts. There is no question of constructive notice or constructive knowledge involved in that inference; it is actual knowledge which is inferred. Constructive notice or knowledge, as I have said, is an equitable doctrine wholly; it is a doctrine not known to the common law, but it must now be dealt with and acknowledged by the Courts which administer the common law. It is, therefore, necessary for us to see how far the doctrine extends, and is to be carried out, and to consider its nature and limits as laid down by the Judges who invented and have applied it. Of late years after the doctrine had been invented and put into form, the Chancery Judges saw that it was being carried much farther than had been intended, and they declined to carry it farther. In a series of cases Lords COTTENHAM, LYNDHURST, and CRANWORTH, Lord Justice TURNER, and the late MASTER OF THE ROLLS, Sir GEORGE JESSEL, have said that the doctrine ought not to be extended one bit farther; all the Judges seem to have agreed upon that. In *Allen v. Seckham*, 11 Ch. D. 790, I pointed out that the doctrine is a dangerous one. It is contrary to the truth. It is wholly founded on the assumption that a man does not know the facts; and yet it is said that constructively he does know them." This agrees with the *dicta* in other cases that what may be called the advanced doctrine in equity of constructive notice is distinct from the inference of knowledge in common-law transactions. Thus it has been said constructive notice does not apply to commercial transactions. See *Manchester Trust Co. v. Furness* (C. A.), 1895, 2 Q. B. 539, 64 L. J. Q. B. 766, 73 L. T. 110, 44 W. R. 178, or to negotiable instruments, see per Lord HERSCHELL in *London Joint Stock Banking Co. v. Simmons*, 1892, App. Cas. 201, 61 L. J. Ch. 723, 66 L. T. 625, 41 W. R. 108, but that "regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith." . . . "The taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him."

However whether the equitable doctrine of constructive notice was or not in its origin similar to the common-law doctrine of inferring *mala fides*, it must be taken as established before the Conveyancing Act of 1882 as an arbitrary rule that neglect to make such inquiries as would as a matter of prudence be done by men of business gave constructive notice of what could have been discovered by such inquiries, and that neglect to investigate the usual title to land on a purchase brought a purchaser within this rule. That a greater amount of negligence is required to postpone a person having a legal title than an equitable title, or in case of land subject to a register or

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unregistered title. But the case of *Patman v. Harland* decides that the provisions of the Vendor and Purchaser Act of 1874, that in absence of contract a purchaser shall not be entitled to investigate the lessee's title, have not altered the old rules, and the decision has been followed and approved of by the Court of Appeal.

Probably if the evidence of conveyancers were taken, they would unanimously declare that both since and before the Vendor and Purchaser Act of 1874, it was the custom of prudent men of business to waive investigation of the lessor's title.

The Vendor and Purchaser Act of 1874, sect. 3, replaced by sect. 15 of the Trustee Act, 1893, expressly authorised trustees to sell or buy without excluding the application of the second section of the Act precluding investigation of the lessor's title : see also sect. 66 of the Conveyancing Act, 1881.

It may still be open to a purchaser to argue that he is protected from constructive notice of a defect in the vendor's title, when there is evidence that that title has been subject to frequent sales, and is well known, though probably, if a defect were disclosed, the Court would judge from the result and not protect him.

It has been held that when a purchase is of very small value to waive the investigation of the usual title is not contrary to what would be done as a matter of prudence by men of business in similar cases, and that a purchaser is not in such case affected with notice of what he might have discovered by investigating a forty years' title. See *Hunter v. Walters* (1871), L. R. 7 Ch. 75, 11 Eq. 292, 24 L. T. 276, 25 L. T. 765.

The actual decision in *Patman v. Harland* was that, notwithstanding the Vendor and Purchaser Act of 1874, a purchaser of a lease is affected by notice of the lessor's title, but the law as laid down in the case extends to the rule that in all cases a purchaser of land is affected with notice of what he would have discovered if he had investigated the "usual" title.

What is the "usual title" to some extent depends on what is purchased. *e.g.* in the case of an advowson the usual title is a title shown for one hundred years or three presentations.

The ordinary rule in case of purchases of land before the Vendor and Purchaser Act of 1874, was that a purchaser might require a sixty years' title at least. Sect. 1 of that Act enacts that, "In the completion of any contract of sale of land made after the 31st day of December, 1874, and subject to any stipulation to the contrary, in the contract forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty

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years may be required in cases similar to those in which earlier title than sixty years may now be required."

It has been seen that in *Patman v. Harland* it was held that the provisions in the Act that a purchaser should not, in the absence of express stipulation, require the lessor's title, did not protect him from constructive notice of it. There has not been an express decision whether the "usual title" now to be investigated is forty or sixty years, but there are clear *dicta* that it is forty years only. See the judgment of NORTH, J., in *Re Cox & Nere's Contract*, 1891, 2 Ch. 109, where he says: "If a purchaser chooses to take property with a thirty-eight years' title without going any further back, he has, in my opinion, constructive notice of that which he would actually have known if he had required a forty years' title to be shown, and had investigated the title during that period. And when I say a forty years' title, I mean a title deduced for forty years, and for so much longer as it is necessary to go back in order to arrive at a point at which the title can properly commence. The title cannot commence *in nubibus* at the exact point of time which is represented by three hundred and sixty-five days multiplied by forty."

The Vendor and Purchaser Act, 1874, sect. 2, sub-sect. 2, enacts, "Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions."

It has not yet been decided how far a purchaser may rely on this to exclude the doctrine recognised in *Patman v. Harland*, that notice of a deed is notice of its contents if it necessarily forms part of the chain of title; but there has been an important decision of the Court of Appeal affirming the doctrine laid down in *Patman v. Harland*, that the doctrine of notice does not apply when the deed need not necessarily affect the title and the purchaser is informed it does not. See *English & Scottish Mercantile Investment Co. v. Brunton*, 1892, 2 Q. B. 700.

There are several cases in which constructive notice is imputed to a purchaser; many of them are discussed by the Judges in the case of *Jones v. Smith*, 1 Hare, at p. 58, that a purchaser who has actual notice of an instrument affecting the title has constructive notice of all other instruments to which an examination of the facts would have led him: see p. 62, in the report of 1 Hare, that notice of a lease is as between the purchaser and the lessee, where the purchase is completed notice of the terms of the lease. *Hanbury v. Litchfield*, 2 Myl. & K. 633, 3 L. J. Ch. 49.

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But as between the vendor and purchaser before completion, the doctrine does not prevent the purchaser's taking objections to the title by reason of some unusual stipulation in the lease, unless the purchaser before signing the contract had an opportunity given him of inspecting the lease. *Reeve v. Berridge* (1888), 20 Q. B. D. 523, 57 L. J. Ch. 265, 58 L. T. 836, 36 W. R. 517, 51 L. T. 199; *Re White & Smith* (1896), 1 Ch. 637.

Notice that the land purchased is in the occupation of some person has been held to be notice of the claims of the occupier. *Jones v. Smith* (1 Hare, on p. 60), and *Mumford v. Stohwasser* (1874), L. R. 18 Eq. 556, 43 L. J. Ch. 694, 30 L. T. 859, 22 W. R. 833, as between the vendor and purchaser, this does not prevent the purchaser taking an objection before completion of his purchase on the ground of such claim. *Caballero v. Henty* (1874), L. R. 9 Ch. 447, 43 L. J. Ch. 635, 30 L. T. 314, 22 W. R. 446.

Courts of Equity have made for convenience an exception to the rule that a purchaser shall have notice of a trust from circumstances that will put him on inquiry in the case of conveyances and mortgages and transfers to trustees as joint tenants. See the case of *Harman and Uxbridge, &c. Ry. Co.* (1883), 24 Ch. D. 720, 52 L. J. Ch. 808, 49 L. T. 130, 31 W. R. 857, where an executrix transferred a mortgage debt without consideration to three persons with a recital that the testator held the money on an account under which the three transferees were then solely entitled, so that the facts showed that the testator of the executrix and the three transferees must have been trustees. Mr. Justice PEARSON said: "Every one knows that when in a mortgage deed the mortgage money is stated to belong to several persons on a joint account, those persons are in ninety-nine cases out of a hundred trustees of the money, and yet the Court has always resolutely refused to go behind the recital or to inquire what the trusts are."

In the latest case dealing with this *Re Blalberg and Abraham's Contract*, 1899, 2 Ch. 340, 68 L. J. Ch. 518, 81 L. T. 75, 47 W. R. 634, the actual trusts were inadvertently disclosed and KEKEWICH, J., held that they were put on the title. He said, "The case of *In re Harman & Uxbridge & Rickmansworth Ry. Co.* does not govern this case because there the trust deed was not disclosed. All that was disclosed was that the testator was a trustee, and it did not appear that any persons other than the testator ever had anything to do with the trust. If there, as here, the facts had been disclosed, it might have been necessary notwithstanding the reluctance of PEARSON, J., — a reluctance which I also feel in this case, — to go into the title."

Statutes have given trustees in all cases power to give receipts, and it would shorten abstracts and materially facilitate dealings with real

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property, if it were laid down that where executors or trustees convey or have conveyed, the person taking title immediately or mediately through them should be protected from inquiry into the trusts.

AMERICAN NOTES.

The American cases are numerous and clear to the effect that a purchaser of land is charged with notice of all recitals in the chain of title through which his own title is derived. "Not only is he bound by everything stated in the several conveyances constituting that chain, but he is bound fully to investigate and explore everything to which his attention is thereby directed." 16 Am. & Eng. En cycl. of Law, 798, citing a large number of decisions.

The American doctrine is stated in this language: "When a person claims under a deed which by its recitals leads him to other facts affecting the title to the property, he is presumed to know such facts: for it would be gross negligence in him not to make inquiry as to the facts he is thus put in the way of ascertaining." *Jones on Real Property*, sect. 1547.

And in *Wade, Law of Notice*, 2nd ed. sects. 310, 313, it is said: "The doctrine embodied in the general statement that a purchaser of realty takes with notice of every adverse legal claim or outstanding equity disclosed by the recitals contained in any of the papers under or through which he traces his title, is of universal recognition, both in this country and Great Britain, subject, however, to such refinements and modifications as the peculiarities of adjudged cases have from time to time demanded. . . . It is not necessary, in order to constitute notice by this means, that the recitals in the antecedent deed or other instrument through which the title is traced shall contain a detailed and explicit reservation of the right or title claimed, in such terms as would dispense with further proof. It will be sufficient if the party cannot make out his title without such instrument, which by its recitals leads him to the fact of which he is to be charged with notice. The reason alleged for the rule is that the purchaser is entitled to see all the muniments of title and therefore must be presumed to have seen them, and to have taken notice of all their recitals which in any way affect his purchase, as the omission on his part to take such precautions would amount to gross negligence."

A purchaser who is thus charged with constructive notice cannot avail himself of the fact that he had not read the deeds and consequently had no actual notice. *Wales v. Cooper*, 24 Mississippi, 208; *Nelson v. Allen*, 1 Yerger (Tenn.), 360. In *Wiseman v. Hutchinson*, 20 Indiana, 40, it was held that a purchaser is chargeable with notice of a fact recited in a deed in his chain of title, although he may not have actually examined the deed, and it may not have been recorded. The Court said: "The defendant, Remlinger, was bound to notice the recitals in the deed from Simpson to Wiseman, not because that deed was recorded, but because she claimed through it. That deed constitutes a part of her chain of title, and she was bound to know its contents and recitals, whether it was recorded or otherwise."

A declaration in a deed of conveyance that the purchase money, or any part thereof, remains unpaid is notice of the existence of a lien for it, in the

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absence of language indicating a waiver or extinguishment of the lien. *Tydings v. Pitcher*, 82 Missouri, 379; *Wiseman v. Hutchinson*, *supra*; *Lytle v. Turner*, 12 Lea (Tenn.), 641; *Willis v. Gay*, 48 Texas, 463; 26 American Reports, 328. As was said in *Deason v. Taylor*, 53 Mississippi, 697, 701, "Nothing is better settled than that the purchaser of real estate is bound to take notice of all recitals in the chain of title through which his own title is derived. Not only is he bound by everything stated in the several conveyances constituting that chain, but he is bound fully to investigate and explore everything to which his attention is thereby directed. Where, therefore, he is informed by any of the preceding conveyances, upon which his own deed rests, that the land has been sold on a credit, he is bound to inform himself as to whether the purchase money has been paid since the execution of the deed."

So, where a deed appears from its very terms, to have been fraudulent, a purchaser from the grantee cannot claim to have had no notice of the fraud. *Johnson v. Thweatt*, 18 Alabama, 741.

But a purchaser is not chargeable with notice of anything lying outside his chain of title. *Polk v. Cosgrove*, 4 Bissell (U. S. Circ. Ct.), 437; *Burch v. Carter*, 44 Alabama, 115; *Hazlett v. Sinclair*, 76 Indiana, 488; 40 American Reports, 254; *Burke v. Beveridge*, 15 Minnesota, 205; *Crockett v. Maguire*, 10 Missouri, 34; *Tydings v. Pitcher*, 82 Missouri, 379; *Coleman v. Barklew*, 27 New Jersey Law, 357; *Boggs v. Varner*, 6 Watts & Sergeant (Penn.), 469. In the last named case it was held that, while a recital in a deed is evidence of notice to the purchaser of the fact recited, and he will be affected by it so far as it concerns the title to the land purchased, it will not affect him with notice in regard to the title of any other land than that which is conveyed by it.

So Judge STORY, in speaking of the rule that "where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact" adds: "This doctrine, however, is to be received with some qualifications. For if a man purchases an estate under a deed which happens to relate also to other lands not comprised in that purchase, and afterwards he purchases the other lands, to which an apparent title is made, independent of that deed, the former notice of the deed will not itself affect him in the second transaction: for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about to make, nor to take notice of more of the deed than affected his then purchase. . . . In short he is bound to take notice of those things only in the deed which affect his present purchase, not any future purchase." *Equity Jurisprudence*, 13th ed. sect. 400, n. 1.

In *Land Co. v. Hill*, 87 Tennessee, 589, it was held that the rule that a party has constructive notice of what appears in the deeds and instruments referred to in the title papers constituting his chain of title, does not, in principle, apply to collateral and immaterial deeds or instruments incidentally referred to, not as relating in any way to the title or land conveyed, but only to the consideration. In that case A. bought a piece of land of B., who had obtained it of C. In the deed from C. to B. it was recited that B., as a part

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of the consideration, had conveyed to C. a certain other tract of land. In the deed referred to, from B. to C., there was a recital that D. had made a will, devising the property in controversy to C. The contention was that A. was charged with notice of the existence and terms of D.'s will.

The doctrine of constructive notice is materially affected in America by the Recording Acts. That the record of a conveyance is in general constructive notice to all subsequent purchasers and encumbrancers, claiming an interest in the same property under the same grantor, is too clear to call for a citation of authority. The subject is fully treated in Jones on Law of Real Property in Conveyancing, sects. 1482 *et seq.* See also 1 Warvelle on Vendors, p. 271; 20 Am. & Eng. Encycl. of Law, 1st ed. pp. 594 *et seq.*; 45 American Reports, 188-190.

The fact that a party deriving title under a recorded deed has no actual knowledge thereof is, of course, immaterial. *Peck v. Conway*, 119 Massachusetts, 546.

The recording of an instrument not required by law to be recorded does not give notice. Thus, in *Pücher v. Barrows*, 17 Pickering (Mass.), 361, it was held that the registry of a deed assigning both real and personal estate is not in itself constructive notice of the assignment of the personal estate.

So, if a document is defectively executed, it is not generally entitled to be recorded, and the recording of it does not amount to constructive notice. Thus, where the use of a seal is required, the record of an instrument purporting to be a mortgage, but not executed under seal, does not impart notice to subsequent purchasers or encumbrancers. *Racoullat v. Sanserain*, 32 California, 376. And a deed recorded without having been duly acknowledged, is not notice. *Herndon v. Kimball*, 7 Georgia, 432; *Choteau v. Jones*, 11 Illinois, 300, 321; *Brown v. Lunt*, 37 Maine, 423; *Blood v. Blood*, 23 Pickering (Mass.), 80; *Bishop v. Schneider*, 46 Missouri, 472; see, for a thorough discussion of this subject, Jones, The Law of Real Property in Conveyancing, sects. 1435-1450.

The question has often arisen as to the effect of errors in the registration of a deed. If the record does not correspond with the document, is it constructive notice merely of what the record contains? This question has been answered differently in different states. Thus, in the leading case of *Frost v. Beekman*, 1 Johnson Chanc. (N. Y.) 288, where a mortgage for three thousand dollars was by mistake recorded as for three hundred dollars, Chancellor KENT held that the record was notice of the contents of it and no more. In many other states, however, under statutes making a deed operative as a record from the time it is filed for record, it is held that constructive notice of the contents of the deed dates from that time, and is not affected by any errors that may be made in the recording. In *Gillespie v. Rogers*, 146 Massachusetts, 610, the Court said: "A deed is considered to be recorded when it is noted by the recording officer as having been received for record in the book kept for that purpose. Rev. Sts. c. 59, sect. 24; Gen. Sts. c. 17, sect. 93; Pub. Sts. c. 24, sects. 15. And if the recording officer places upon it his certificate that it has been so received, even though he afterwards fails in his duty by recording it inaccurately, by omitting material portions of it, or even

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by altogether suppressing it from the records, yet, in contemplation of law, the whole world has constructive notice of it, just the same as if it had been accurately copied in full upon the records."

The authorities are also in conflict as to whether the index is part of the record. In *Curtis v. Lyman*, 24 Vermont, 338, it was held that the neglect of the register's clerk to index a mortgage did not prevent the record of it from affecting subsequent purchasers with notice. *Barney v. McCarty*, 15 Iowa, 510, illustrates the opposite view.

The whole subject of errors in the record, and the effect of omissions from the index, is treated in Jones on Law of Real Property in Conveyancing, sects. 1468-1481.

In addition to the constructive notice afforded by recitals in deeds constituting the chain of title, and by the information obtainable from the registries of deeds, there is a more general principle upon which a purchaser of land may be charged with notice of an adverse claim. "Where a purchaser has knowledge of any fact sufficient to put a prudent man upon an inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of some right or title in conflict with that he is about to purchase, it is his duty to make the inquiry, and if he does not make it, he is guilty of bad faith or negligence to such an extent that the law will presume that he made it, and will charge him with the actual notice he would have received if he had made it." EARL, C., in *Cambridge Valley Bank v. Delano*, 48 New York, 326, 340.

"The general rule is, that notice sufficient to make inquiry a duty is notice of all that by reasonable inquiry would have been ascertained." *Cunningham v. Patter*, 99 Massachusetts, 248, 252.

Where a party has heard from a creditable source of the sale of land, and under circumstances not likely to be forgotten, the duty devolves upon him, if he intends to acquire the land, of investigating the facts, and if he neglects to do so, he cannot claim protection as a *bonâ fide* purchaser. *Cox v. Milner*, 23 Illinois, 476.

But a purchaser is not bound to give heed to every idle rumor. As Judge DILLON said, in *Wilson v. Miller*, 16 Iowa, 111, "To affect or charge Beeson, notice of the plaintiff's rights must be clearly brought home to him. Vague rumors and indeterminate suspicions will not answer, nor will general assertions, made by strangers to the title, and resting on hearsay, be sufficient. The fact must be such as to bind the conscience of the party, to alarm him, and put him upon such inquiry, as if prosecuted would lead him to a knowledge of those rights with which it is proposed to affect him." And in *Bacon v. O'Connor*, 25 Texas, 213, the Court said: "It is very true that a purchaser of real estate will not be affected with notice of a defect in the title which he purchases by every idle rumor that may chance to be floating about, to the effect that the title is not a good one, provided he uses proper care in investigating the title which he purchases. So if a purchaser has certain information of a particular defect in the title which he proposes to purchase, and pursues a proper inquiry into the truth of the information which he receives, and ascertains facts which would satisfy a prudent man that the defect to

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which his attention has been called does not in point of fact exist, he may still be a purchaser in good faith. But the case is different where a party who proposes to purchase real estate has notice of such facts as would lead to a discovery of the truth upon proper inquiry, and who stops short in his inquiry of that point to which a prudent man, under the circumstances, would go."

Possession of land by one not the record owner is sufficient to put an intending purchaser upon inquiry. The decisions to this effect, which are very numerous, are collected in *Jones on Law of Real Property in Conveyancing*, sects. 1563 *et seq.*; *Wade on Law of Notice*, 2nd ed. ch. iv.; 16 *Am. & Eng. Encycl. of Law*, 1st ed. pp. 800 *et seq.*

Upon the general question as to what facts are sufficient to charge a purchaser with constructive notice, see, in addition to the cases above cited, *McGehee v. Gindrat*, 20 Alabama, 95; *Centre v. P. & M. Bank*, 22 Alabama, 743; *Ringgold v. Waggoner*, 14 Arkansas, 69; *Wright v. Ross*, 36 California, 114; *Booth v. Barnum*, 9 Connecticut, 286; *Blatchley v. Osborn*, 33 Connecticut, 226; *Chicago, R. I. & P. R. Co. v. Kennedy*, 70 Illinois, 350; *Shepardson v. Stevens*, 71 Illinois, 646; *Erickson v. Rafferty*, 79 Illinois, 209; *Prie v. McDonald*, 1 Maryland, 403; *Barnard v. Campau*, 29 Michigan, 162; *Shotwell v. Harrison*, 30 Michigan, 179; *McLeod v. First Nat. Bank*, 42 Mississippi, 99; *Parker v. Fay*, 43 Mississippi, 260; *Warren v. Swett*, 31 New Hampshire, 332; *Nute v. Nute*, 41 New Hampshire, 69; *Hoy v. Bramhall*, 19 New Jersey Eq. 563; *Pendleton v. Fay*, 2 Paige (N. Y.), 202; *Williamson v. Brown*, 15 New York, 354; *Brion v. Volkening*, 64 New York, 76; *Littleton v. Giddings*, 47 Texas, 109; *Blaydsell v. Stevens*, 16 Vermont, 179; *Stevens v. Goodenough*, 26 Vermont, 676; *Brinkman v. Jones*, 44 Wisconsin, 498. See also a note in 23 *American Decisions*, 47.

No. 5. — *Le Neve v. Le Neve*, Ambler, 436. — Rule.

No. 5. — *LE NEVE v. LE NEVE*.

(1747.)

No. 6. — *AGRA BANK v. BARRY*.

(1874.)

RULE.

NOTWITHSTANDING the provisions of the Registry Acts as to land in Middlesex, Yorkshire, and Ireland, that a prior unregistered deed is to be taken as fraudulent and void against a registered purchaser, notice either actual or constructive of an unregistered deed, either to a purchaser direct or to his agent in the same transaction, affects the purchaser; and his conveyance, though registered, is subject to it.

Whether constructive notice is to be implied from failure to require production of deeds or to examine title is a question to be decided with reference to the nature and circumstances of each particular case, and among these the existence of a public registry established by statute must necessarily be material.

Le Neve v. Le Neve.

Ambler, 436-447.

Registration (Middlesex). — Notice of Unregistered Deed.

[436] Lands in a register country settled by a deed which is not registered, are settled upon a second marriage, with notice of the former settlement: and the second settlement is registered pursuant to the statute 7 Anne. The former settlement shall be preferred in equity. Notice to agent or trustee is notice to principal.

The bill was brought by the plaintiffs, Peter Le Neve and Hugh Pigott, and Elizabeth his wife, late Elizabeth Le Neve, as the only surviving children of the defendant Edward Le Neve, by Henrietta his late wife.

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The end of the bill in general is, to have the execution of trust of leasehold estates settled upon the late wife of Edward Le Neve, and the issue of that marriage, by articles previous to the marriage, dated 1st July, 1718; and that the conveyances made by the defendant Edward Le Neve, and the defendant Mary his now wife, to trustees, may be set aside, and delivered up, being made after notice of the articles of the 1st of July, 1718, or of the other conveyances made in pursuance thereof; and to have the leasehold exonerated and disencumbered.

The facts are, that in 1718, the defendant, Edward Le Neve, intermarried with his first wife Henrietta Le Neve, who had a considerable fortune; and articles were executed previous to the marriage, dated the 1st July, 1718, whereby the father of Edward, in consideration of Henrietta's fortune, &c., covenanted with trustees, to convey to them several estates, and some leasehold amongst the rest, near Soho-square in the county of Middlesex; to permit Edward Le Neve, the younger, to receive the rents and profits during his own life, and after his death, to pay to Henrietta £250 a-year, in case she survived Edward; and after the decease of Edward and Henrietta, then the said estates should remain to their issue in such manner as Edward the younger should, by will or otherwise, appoint; and for want of such issue, to the use of Edward Le Neve the father, and his heirs.

The 16th June, 1719, a settlement was made in pursuance [437] of the articles.

The marriage took effect; and Edward and Henrietta had issue, plaintiffs Peter and Elizabeth. Henrietta died July, 1740, leaving no other children.

Twenty-five years after the first marriage, Edward Le Neve entered into a treaty of marriage with the defendant Mary, and by articles dated the 16th November, 1743, previous to the marriage, Edward, in consideration of such marriage, covenanted with the trustees, the defendants Dandridge and Norton, to convey these very leasehold estates near Soho-square to them, their executors, &c., within three months after the marriage, in trust to pay to defendant Mary, out of the rents of these messuages, in case she survived him, a clear annuity of £150 for her life, for her jointure, &c.

The marriage took effect, and three months after, on the 20th January, 1743, a settlement was made pursuant to the articles.

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The settled estate, being houses in Middlesex, was subject to the Register Act, 7 Anne, c. 20.

The second articles and settlement were registered, but not the first.

Edward has mortgaged the houses likewise.

The bill is brought, in order to set the second articles and settlement out of the way, and that they may be postponed to the first articles and settlement; upon this equity, that the defendant Mary Le Neve had notice of them.

The counsel for the plaintiffs admit, that the registering of the second articles and settlement has, in point of law, affected the leasehold estates, as the 7 Anne gives the legal estate where the effect of the registering has placed it.

[438] The question is, whether equity will enable the children of the first marriage to get the better of the defendant's legal right? And this will depend upon the question of notice:

1st, Whether it appears sufficiently, that Joseph Norton was attorney for the defendant Mary in the transaction of her marriage?

2ndly, Whether Norton himself had sufficient notice of the first articles and settlement?

3rdly, Whether that will affect Mary as a purchaser, and postpone her articles and settlement, notwithstanding the Register Act?

First, it will depend on the answer of the defendant Mary.

She has in general denied any notice of the first articles and settlement till six months after the marriage; and says, "That the defendant Joseph Norton was so far from being employed as solicitor for her in transacting the business of the marriage articles and settlement, that he had been for a considerable time before employed as attorney for the defendant Edward Le Neve, her husband: that being at the time of the marriage concerned for her husband, she was thereupon induced to place confidence in him; and her husband assured her he would take care there should be a handsome provision made for her, and recommended Norton as a proper person to prepare the deeds whereby such settlement was to be made upon her, to which she consented; and that Norton assured her, that he had taken care to secure for her £150 a-year, by way of jointure, and did not then, or at any time before her intended marriage, give her any notice of any former settlement."

It is insisted by the defendant Mary's counsel, that Joseph

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Norton was not her attorney or agent, but her husband's; and that the attorney for one party having notice, will not affect her with notice.

I am of opinion, she has admitted enough on her side to make him attorney or agent for her. If she placed confidence in Joseph Norton, no matter on whose recommendation; if she [439] relied enough on her husband to take his recommendation, it is sufficient; or otherwise, it would be mischievous and inconvenient, if this Court was to take into their consideration from whom the recommendation comes; for in purchases, and more especially in mortgages, very frequently the same counsel and agents are employed on both sides, and therefore each side is affected with notice as much as if different counsel and agents had been employed.

It is material to see how far the cases have gone in this point. Two have been cited, *Brotherton v. Hatt*, 2 Vern. 574, and *Jennings v. Moore, Blincorn, and Others*, 2 Vern. 609 [s. c. 2 Bro. P. C. Ed. Toml. 278]. The first was shortly this: A. makes three several mortgages, to B, C, and D.; and in the last mortgage, B. is a party, and agrees, after he is paid he will stand a trustee for D. Deceed, that C. shall be paid before D., for all the securities being transacted by the same scrivener, notice to him was notice to D.

See how far this goes: the same scriveners were witnesses, and engrossed all the securities, and were in nature of agents for all the lenders, and very likely for the borrower himself; and notwithstanding it does not appear Mrs. Hatt had personal notice, "yet notice to the agent is notice to the party, and consequently they that lend last must come last, having notice of what was before lent; and if any one after notice lend more money, although he should obtain the legal estate, yet he would in equity stand affected with the notice, and be bound thereby."

The second case was no more than this: Blincorne, having notice of an encumbrance, purchases in the name of Moore, and then agrees that Moore shall be the purchaser, and he accordingly pays the purchase money without notice of the encumbrance. Though Moore did not employ Blincorne, nor know anything of the purchase till after it was made, yet Moore, approving of it afterwards, made Blincorne his agent *ab initio*, and therefore shall be affected with the notice to Blincorne.

The last goes a great way, for Moore knew nothing of the [440]

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transaction, and yet the Court held, that his approving it afterwards made Blincoe his agent *ab initio*. This carries it further than the present case; but the first is a clear authority.

These cases therefore sufficiently prove, it is not at all material to the plaintiffs on whose advice or recommendation the defendant Mary entrusted Norton: nor does it make any difference, that it is the recommendation of the husband, any more than of any other person.

Second consideration is (as it appears clearly that Norton was employed for defendant Mary), whether there is sufficient evidence of notice to him?

An objection has been taken by defendant Mary's counsel, that as notice hath been denied by her answer, if it be sworn to by one witness only, that being but oath against oath, cannot prevail to establish the fact.

The general rule, to be sure, is so, but it admits of this distinction: Where the denial of defendant is clear, it has been adhered to; but where the answer is not a positive denial of the same fact, but only as to part, as in the present case, as to the notice to herself only, it makes a difference.

And there are many cases where the Court, upon the testimony of one witness, whose credit is unimpeached, and what he swears is uncontradicted by the answer, have decreed upon this single evidence.

The defendant Mary denies notice to herself; but whether there was notice to another person, her agent, she passes by, without giving any answer.

This is a denial indeed as to herself, but it is at the same time what is called at law a negative pregnant, that there was notice to her agent.

[441] As to the evidence of notice to Norton, it is extremely strong; for he swears that he had notice of the first articles some time before the second marriage, and that he had then a copy thereof from the defendant Edward Le Neve, in order to take counsel's opinion thereon, how to secure against the effect of them, and to contrive in what manner they might get the better of these articles; and therefore as to Norton there cannot be a stronger notice.

The third and last general question is, whether the notice to Norton will affect the defendant Mary as a purchaser, and post-

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pone her articles and settlement, notwithstanding the Register Act?

This depends on two things :

1st, Whether any notice whatsoever would be sufficient to take from the defendant the benefit of the Register Act?

2nd, Whether personal notice to the defendant Mary is requisite to postpone her? or, whether notice to her agent is sufficient to do it likewise?

As to the 1st, it is a question of great extent and consequence.

The preamble of the statute of the 7 Anne, c. 20, is in substance, "Whereas, by the different and secret ways of conveying lands, &c., such as are ill-disposed have it in their power to commit frauds, and frequently do so, by means whereof several persons have been undone in their purchases and mortgages, by prior and secret conveyances, and fraudulent encumbrances."

Then comes the enacting clause, "That a memorial of all deeds and conveyances which, after the 27th of September, 1709, shall be made and executed, and of all wills and devises in writing, whereby any honours, manors, land, &c., in the county of Middlesex, may be any way affected in law or equity, may be registered in such manner as is after directed: and that every such deed or conveyance that shall at any time after, &c., be made and executed, shall be adjudged fraudulent and void against [442] any subsequent purchaser or mortgagee for valuable consideration, unless such memorial be registered as by this Act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim, &c."

What appears by the preamble to be the intention of the Act?

Plainly, to secure subsequent purchasers and mortgagees against prior secret conveyances and fraudulent encumbrances.

Where a person had no notice of a prior conveyance, there the registering his subsequent conveyance shall prevail against the prior; but if he had notice of a prior conveyance, then that was not a secret conveyance by which he could be prejudiced.

The enacting clause says, that every such deed shall be void against any subsequent purchaser or mortgagee, unless the memorial thereof be registered, &c.; that is, it gives him the legal estate; but it does not say, that such subsequent purchaser is not left open to any equity which a prior purchaser or encumbrancer

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may have; for he can be in no danger when he knows of another encumbrance, because he might then have stopped his hand from proceeding.

This case has been very properly compared to cases on the 27 Hen. VIII. for enrolment of bargains and sales.

That Act is formed pretty much in the same manner with this.

The words of the enacting clause: "That from, &c., no manors lands, tenements, &c., shall pass, alter, or change, from one to another, whereby any estate of inheritance or freehold shall be made, or take effect in any person or persons, or any use thereof

to be made thereof, by reason only of any bargain and sale [443] thereof, except the same bargain and sale be by writing

indented, sealed, and enrolled, in one of the King's Courts of Records at Westminster, or else within the same county, &c., where the same manors, &c., so bargained and sold do lie, &c.; and the same enrolment to be had and made within six months next after the date of the same writings indented, &c. Nor any use shall pass thereof from one to another."

What is the meaning of this?

Before the making of the Act, any paper writing passed the use from the bargainor to the bargainee, whereby great mischief arose; for it entangled the purchasers, affected and injured the Crown, and was contrary to the rule of law, which required notoriety in purchases by feoffment and livery, &c.

But what has been the construction of this statute ever since? Why, if a subsequent bargainee has notice of a prior, he is equally affected with that notice as if the prior purchase had been a conveyance by feoffment and livery, &c.

The operation of both Acts of Parliament and construction of them is the same; and it would be a most mischievous thing, if a person taking that advantage of the legal form appointed by an Act of Parliament, might under that protect himself against a person who had a prior equity of which he had notice.

The cases put by the Attorney-General are very material:

Suppose (said he) the defendant Mary had by letter of attorney empowered Norton to transact the affair with her husband, and he by means of this agency comes to the knowledge of the prior articles and settlement, would not this affect the principal? Or suppose a purchaser of lands in a register county orders his attorney to register it, and he neglects to do it, and then buys the

No. 5. — *Le Neve v. Le Neve, Ambler, 443-445.*

estate himself, and registers his own conveyance, shall this be allowed to prevail?

It certainly shall not; for such a purchaser is out of the consequences which the Register Act guards against, of imposition from a prior secret conveyance, as he had personal [444] knowledge of the first.

There have been three cases on the Register Act: *Lord Forbes v. Nelson*, 4 Bro. P. C. Ed. Toml. 189; *Blades v. Blades*, 1 Eq. Ca. Abr 358, Pl. 2; *Chival v. Nicholls*, 10th December, 1725, in the Exchequer. [1 Stra. 564.]

The first arose originally in Ireland, where there is a general Register Act, and heard on appeal to the House of Lords in England, 22nd and 23rd February, 1722.

The Earl of Granard, father of Lord Forbes, was seised of a large estate of which he was tenant for life, with remainder to his first and every other son in tail; and had a power of leasing for lives at the best rent.¹

The Register Act in Ireland passed the 6 Anne; Lord Granard granted a lease for three lives, at the rent of £30 a year, which was not registered.

His Lordship, being greatly in debt, came to an agreement with Lord Forbes, his eldest son, by the agency of Mr. Steward, to take upon him the payment of certain debts of his father, and to secure a jointure to his mother-in-law, and an annuity to his father.

The estate was conveyed to Mr. Justice Doyne and Mr. Justice Nutt, as trustees, during the life of the father.

Mr. Steward had notice of this lease during the treaty between Lord Granard and Lord Forbes.

The conveyance to the trustees being registered, they brought an ejectment against the lessee of the leasehold estate: and it was heard before Lord MIDDLETON, LORD CHANCELLOR of Ireland, in February, 1721, who then made a declaration, rather than a decree, that the conveyance was void as against the lessee. [445] It came on again before him the 17th of February, 1721, and then determined, there was full notice of the lease to Lord Forbes, and awarded a perpetual injunction from time to time.

¹ There is a material difference between the Irish and English Registry Act. As by the former an absolute priority is expressly given to the instruments first registered, see *Bushell v. Bushell*, 1 Sch. & Lef. 78; *Lutwiche v. Dunsany*, ib. 157. *Darcy v. Chambers*, ib. 467; *Eyre v. Dolphin*, 2 Ba. & Be. 299; *Pentland v. Stokes*, 2 Ba. & Be. 75; *Daly v. Kelly* & Dow, P. C. 436.

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The judgment of the House of Lords was, that the said decree be reversed, and that all proceedings at law of the appellants against the respondents should, during the life of Lord Granard, be stayed, on lessee's paying the rents, performing the covenants, &c.: but that after the death of Lord Granard, Lord Forbes might be at liberty to try the tenant's right to the lease.

The decree was reversed, not because Lord MIDDLETON had proceeded on a wrong principle, but had drawn a wrong inference from it; for Lord Forbes did not insist merely on the register, but that the lease was made contrary to the power; and therefore the LORD CHANCELLOR of Ireland was mistaken and wrong in decreeing the lease to be good in every respect: and the House of Lords set the decree right only as to this particular part, that after the death of Lord Granard the estate determined; and therefore left it open to Lord Forbes to dispute whether it was a lease pursuant to the power, but gave no relief as to the Register Act.

The case of *Blades v. Blades* came before Lord Chancellor KING, 2nd May, 1727.

William Blades, in 1716, devised certain lands to his wife for her life, and after her death to his nine children. The wife enters, but does not register the will. The heir-at-law mortgages the estate, and has it registered; and upon a bill brought against him, denies notice of the will. But it was proved in evidence, that he had notice: and the Court said, that having notice of the first purchase (though it was not registered) bound him; and that getting his own purchase first registered was a fraud; the design of those Acts being only to give parties notice, who might otherwise without such registry be in danger of being imposed on by a prior purchase or mortgage, which they are in no danger of when they have any notice thereof in any manner, though [446] not by the registry: and that they would never suffer any Act of Parliament made to prevent fraud to be a protection to fraud: and therefore decreed for plaintiff, looking upon the transaction between the heir-at-law and mortgagee to be collusive.

I mention this, not only as a material authority, but as determined by Lord KING, who, we all know, was as willing to adhere to the common law as any Judge that ever sat here.

The other case, of *Chirall v. Nicholls*, was in the Court of Exchequer, the 10th of December, 1725, before Lord Chief Baron

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GILBERT, and is a clear authority for giving relief against the Register Act upon an equity of notice. But then there were charges of fraudulent circumstances besides, and therefore not so similar to the present.

Consider, therefore, what is the ground of all this, and particularly of those cases which went on the foundation of notice to the agent. The ground of it is plainly this, that the taking of a legal estate after notice of a prior right, makes a person *malâ fide* purchaser; and not, that he is not a purchaser for a valuable consideration in every other respect. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate.

And this exactly agrees with the definition of the civil law of *dolus malus*, Dig. Libr. 4, Tit. 3. “*Dolum malum Servius ita definit. Machinationem quandam alterius decipiendi causâ, cum aliud simulatur, cum aliud agitur. Labeo autem posse et sine simulatione id agi ut circumveniantur. Posse et sine dolo malo aliud agi, aliud simulari, sicuti faciunt, qui jus ejusmodi dissimulationem deserviant et tuentur vel sua vel aliena. Itaque ipse sic definit dolum malum esse omnem calliditatem fallacium machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitum. Labeonis definitio vera est.*”

Now if a person does not stop his hand, but gets the legal estate when he knew the right was in another, *machinatur ad circumveniendum*. It is a maxim, too, in our law, that [447] *fraus et dolus nemini patrocinarî debent*. Vid. 3 Co. Rep. 78, 7 Co. Rep. 38.

Fraud, or *mala fides*, therefore, it is the true ground on which the Court is governed in the cases of notice; and it is a consequence of the decision of the former question, that notice to the agent is sufficient; for if the ground is the fraud, or *mala fides*, of the party, then it is all one, whether by the party himself or his agent; still it is a *machinatio ad circumveniendum*, and the putting a copy of the first articles and settlement into Norton's hands, to take the opinion of counsel in what manner they could be set aside, is a contrivance to circumvent.

It has been said, if this woman has been imposed on by her husband, she, instead of cheating, has been cheated.

But then who ought to suffer? the person entrusting an agent,

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or a stranger who did not employ him? He certainly who trusts most ought to suffer most.

Mrs. Hatt, the third mortgagee in the case in 2 Vern. mentioned before, was imposed on; and so was Moore, in the other case reported there, clearly imposed on: and yet if this was to be any excuse, it would make all the cases of notice very precarious: for it seldom happens but the agent has imposed on his principal; and notwithstanding that, the person trusting ought to suffer for his ill-placed confidence.

Therefore, in both respects, as agent and trustee, notice to Joseph Norton is notice to defendant Mary likewise. And as to the Registry Act, here is sufficient equity in the plaintiff to postpone the second articles and settlement, notwithstanding those only have been registered. And decreed accordingly.

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L. R. 7 H. L. 135-158.

[135] *Mortgage, Equitable and Legal. — Priority. — Registration Act (Ireland). — Client affected by Solicitor's Knowledge.*

The non-production, in Ireland of title deeds to the solicitor instructed to prepare a mortgage upon an estate there, will not of itself be deemed a proof that the solicitor has acted fraudulently, or even negligently, so as to affect the interests of his client. The construction to be put upon his conduct does not depend on an inflexible rule of law, but upon the circumstances of the case.

Where, therefore, the owner of an estate in Ireland had already created an equitable mortgage upon it by depositing the title deeds with a creditor (which equitable mortgage was not registered); and, afterwards, on being asked for them by a solicitor who was about to prepare, for another creditor, a legal mortgage of the same estate, gave an excuse for their non-production, which, under the circumstances, appeared quite satisfactory, and also supplied in his own handwriting a summary statement of their contents; and the solicitor, in total ignorance of the equitable mortgage, and of all that had been previously done, prepared the legal mortgage, which was duly registered: —

Held, that the legal mortgage had priority over the equitable mortgage, and was not assailable on the ground that the solicitor had improperly acted in preparing it without insisting on the production of the deeds:

Per Lord SELBORNE. It is inconsistent with the policy of the Irish Registration Law to impose on a mortgagee, or purchaser, the duty of inquiry with a view to the discovery of previous unregistered interests, but quite consistent with it, if he knows of the existence of those interests, to estop him from contending that, as to him, they are void merely because they are unregistered.

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The doctrine of imputing in all cases the knowledge possessed by the solicitor to the client who employs him, considered.

In the year 1847, Mary Teresa Haly (widow) was married to Alexander Mackay, who, in the year 1850, became the proprietor of a business in the jute trade at Serajgunge, in Bengal. In 1851, * George Richard Barry was admitted as his part- [* 136] ner in this business. Each partner was, under the articles of partnership, to be entitled to draw out of the concern for his own use a sum of Rs. 400 (£40) per month. Mackay died at Dacca on the 14th of September, 1856, and by his will dated the 15th of August, 1856, he left everything to his wife and children, and made her his sole executrix. He left by her two children, Alexander James and Mary Georgina, both of whom are still minors. His property consisted of a policy on his life for Rs. 25,000 (£2500), his share in the Serajgunge concern, and some other matters not of considerable amount. The amount of the policy was received by the executrix, and invested in government securities. The profits of the business of Mackay, Barry, & Co. amounted, up to Mackay's death, to above Rs. 206,963, equal, for the share of Mackay, to £10,348 3s. 6d. Mrs. Mackay did not draw this sum out of the concern, but permitted it to remain there for the benefit of the business, Barry undertaking to pay the usual Indian rate of interest, 10 per cent, for the same. In the year 1857, Mrs. Mackay married George Richard Barry, and advanced to him the Rs. 25,000, the policy money, on his undertaking to give her, as executrix of Mackay, security for the same. This money was not all lent at once, but at intervals, and she, pressing for security on account of her children, obtained from him on the 28th of February, 1861, a bond, given to her in her character of executrix of Alexander Mackay, in the penal sum of Rs. 50,000, to secure the payment on the 3rd of December, 1863, of Rs. 25,000, with any farther advances, and 10 per cent interest, with annual rests. As a farther security, he executed a mortgage, of even date, of his interest in certain tea estates in Assam. The jute concern was in 1864 sold by Barry to a limited company for £28,000, but no part of the purchase money was handed over to the executrix of Mackay's estate. Mrs. Barry became in 1866 much alarmed at the state of money matters in India and in England, and pressed her husband for security for her children. He was at that moment in

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apparently prosperous circumstances, was a member of Parliament for the county of Cork, and was known to be engaged in the purchase of estates in Ireland. He consented to give the required security, and the solicitor employed to prepare it was Mr. [* 137] William Henry Daniel *Oelme, who had not before been employed by Mr. or Mrs. Barry, but who had practised in India, and was acquainted with Indian as well as English business. Mr. Barry gave him instructions to prepare the deed of mortgage, which was to be given upon Barry's Irish property. This property consisted of certain estates at Gortnaclough and Crinallow, and also of Dunbollog, the purchase of which last-named property was not at that time completed. Mr. Oelme, with a view of preparing the deed, asked Barry for the conveyances; he received the draft conveyance of Dunbollog, but, on asking for the conveyances of the Gortnaclough and Crinallow properties, he was told that they were at Mr. Barry's residence at Lota, in the county of Cork, but particulars of them were promised to be furnished, and those particulars were furnished in writing by Barry himself. Mr. Robert Henry Haly (Mrs. Barry's son by her first marriage), who had previously managed the business in India, consented to be the trustee under the deed, which was executed on the 5th of October, 1866. This deed conveyed the Gortnaclough and Crinallow property, and also the Dunbollog property (the purchase of which last-named property had been completed on the 11th of June, 1866) to Haly in trust for Mrs. Barry, or other the legal personal representative of Alexander Mackay, with a proviso for redemption on payment of £31,641 12s. 6d. (that sum being taken as the gross amount of Barry's indebtedness to Mackay's estate) on the 1st of January, 1872, with interest at 5 per cent. This deed was registered on the 12th of October, 1866. At that time Barry was, in fact, considerably indebted to the Agra Bank (Limited), especially for a loan of £25,000 advanced by the Agra & Masterman's Bank (now the Agra Bank) in June, 1860, and had written certain letters to the bankers, dated the 27th and the 29th of [* 138] June, 1865,¹ and the 7th and the 13th *of April, 1866,

¹ The important part of that letter, which formed the foundation of the banker's claim, was as follows:—

"With reference to the conversation I had with you this morning on the subject of my receiving a loan from the bank of

£25,000 for six months, I beg to state that, in security for same, I shall be prepared to lodge with you the joint promissory note of Mr. W. Thompson and myself for the above amount, with debenture bonds in my favour for £30,000, due

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which they insisted constituted an equitable mortgage of his Irish property in their favour. The deeds of the Gortnacloagh and the Crinallow property had been, in fact, deposited with the bankers, instead of being at Barry's house at Lota, but no deposit of the deeds of the Dunbollog property had been made.

On the 1st of February, 1867, the appellants filed a cause petition (which was afterwards amended) praying for specific performance of the agreement by way of equitable charge contained in the aforesaid letters. The original bill was drawn against Barry himself, but he died on the day before it was put on the file, and it was afterwards amended by making Mrs. Barry and Mr. Haly parties thereto. The amended bill filed on the 25th of May, 1868, charged that the granting of the mortgage to Mrs. Barry was fraudulent, that it was granted without consideration, that no inquiry was made for the title deeds of Gortnacloagh and Crinallow, and that the neglect to make such inquiry was itself a legal fraud sufficient to deprive the defendants of any priority by reason of the registration of their mortgage, and that they must be taken to have had notice — constructive notice, at least — through Oehme, of the previous equitable mortgage to the bank.

The defendants, in their answer, denied all knowledge of the loan of £25,000 to Barry, or of any security given for it.

The cause was heard before the MASTER OF THE ROLLS, who declared the deed of the 5th of October, 1866, to be fraudulent and void as against the bankers. Mrs. Barry appealed against that decision, contending that the cause petition ought to have been dismissed with costs, so far as it sought to obtain priority for the demand of the bank over the mortgage of the 5th of October, * 1866, to the extent of any moneys thereby secured [* 139] which were at the date thereof due upon the bond and

on the 1st of January, 1867, as collateral security, or, if the bank would prefer it, would lodge the title deeds of the property in Ireland, which I am now purchasing, to the above value. You will oblige me by placing my application before your directors to-day, and, hoping that they will accede to my proposal,

"I am, &c.,

"G. R. BARRY."

The bank directors did agree to the proposal, advanced the money, and received the deeds relating to Gortnacloagh

and Crinallow. The transaction as to the Dunbollog estate was not then completed, and the deeds relating to that property were never deposited, though Mr. Barry, on the 29th of June, wrote to say he would lodge them "when the purchase of the Dunbollog property is completed." There were thus memoranda accompanying the deposit of the title deeds. As to the propriety of registering (under a similar Act, the Irish Banker's Act), in a case where such memoranda existed, see *Copland v. Lucas*, L. R. 5 H. L. 358.

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mortgage of the 1st of March, 1861. The LORD CHANCELLOR (Lord O'HAGAN) and the Lord Justice of Appeal CHRISTIAN expressed their opinion that the decree of the MASTER OF THE ROLLS must be varied (Ir. Rep. 6 Eq. 128), for that giving priority to the first equitable mortgage, though unregistered, over the second legal mortgage, which was registered, it could not be sustained, there being no evidence whatever to show that the grantees in the mortgage deed had been guilty of any fraud or had had notice, actual or constructive, of the equitable mortgage.

This was an appeal against that decision.

Mr. Fry, Q. C., and Mr. Gerald Fitzgibbon, Q. C. (of the Irish bar), (Mr. Westlake, Q. C., was with them), for the appellants:—

The real claim of the respondents here rests alone on the fact of registration. But it has long since been decided that registration of a deed, with notice of a prior deed unregistered, shall not prevail against it. *Blades v. Blades*, 1 Eq. Cas. Abr. 358. The object of the statute was to prevent frauds. *Forbes v. Deniston*, 4 Bro. P. C. (8vo Ed.) 189. No one can doubt that the solicitor who prepared the deed was, at the least, utterly careless to inform himself of the facts, and avoided making any inquiry which might be inconvenient to his clients. He must, therefore, be taken in equity to have been cognisant of those facts, or at least to have the full opportunity of being cognisant of them, and, being so, his knowledge affects his clients with notice; for in all the cases a determination not to inquire, a wilfulness in evading the duty to inquire, has always been treated as equivalent to actual notice. Vice-Chancellor TURNER so expressly declared in *Heritt v. Lonsdale*, 9 Hare, 449, 21 L. J. Ch. 69, although he did not apply the rule in that case, because he did not think that the evidence there had made out that there was any evasion of inquiry. That case was cited and considered in *Wormald v. Maitland*, 35 L. J. Ch. 69, and there it was held that constructive notice of a prior unregistered encumbrance affecting lands in Middlesex is as effective as actual notice, and an equitable mortgage of a prior [*140] date, though *unregistered, was held to have priority over even a registered marriage settlement. *In re Allen's Estates*, Ir. Rep. 1 Eq. 455, is to the same effect. In *Sheldon v. Cox*, 2 Eden, 224, Amb. 624, notice of an unregistered mortgage was held to affect subsequent mortgagees who had registered, and the fact that the agent of the subsequent mortgagees was himself

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the owner, was declared to make no difference in the matter. *Boursot v. Savage*, L. R. 2 Eq. 134, was to the same effect. There A., being one of three trustees, executed an assignment of the trust property. A. was also a solicitor, and subsequently effected a sale of the same property, in which sale he acted as solicitor for the purchasers, and they were held to be, through him, affected with notice of the previous assignment. *Hine v. Dodd*, 2 Atk. 275, does not affect this case, nor *Jolland v. Stwinbridge*, 3 Ves. 478, nor *Wyatt v. Barwell*, 19 Ves. 435, nor *Chadwick v. Turner*, L. R. 1 Ch. 310, for they really all depended on what amounted in each to notice, and they declared nothing more than this, that where you allege fraud you must make it out clearly by proof. Then comes the question, what is the general rule in such cases as the present, whether actual notice is required, or whether constructive notice is not enough. It is submitted that constructive notice is enough. In *Le Nere v. Le Nere*, 3 Atk. 646, 1 Ves. 64, Amb. 436 (p. 774, *ante*), constructive notice, that is, notice through the agent of the defendant, was held to be notice to the defendant himself, and that was a case which related to marriage articles, where of course the ordinary rule of presumption would be in favour of the articles. Here there is strong ground for believing that Barry never intended to mortgage this property to the respondents, but did what he did solely to defraud the bankers, from whom he had just before procured a large advance of money. Their loan was a real loan, while the sums which made up the £31,000 of the mortgage deed were not shown to be really owing. In such a case constructive notice must be sufficient.

In Ireland, which has long been a registry country, these matters were constantly occurring, and the rule has there been laid down plainly in a succession of cases, that the knowledge of the solicitor is the knowledge of the client, and constructive notice has

* again and again been held to be sufficient. *Marjoribanks* [* 141] v. *Horenden*, 1 Dru. Rep. t. Sug. 11, was a remarkable instance. There A., a solicitor, was the owner of some property in right of his wife. He executed to M., in 1805, a mortgage of this property. This mortgage was not registered. In 1806, he executed a second mortgage of the same property to N., being in that instance employed by N. as her solicitor and agent. This mortgage of 1806 was duly registered. Yet in a contest for priority between these two mortgages, it was held that N. was affected

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with notice of the mortgage of 1805 in consequence of her having employed A. as her solicitor, and so could not rely on the priority which she would otherwise have enjoyed in consequence of the registering of the mortgage executed in 1806. Lord Chancellor STURDEN there discussed all the leading cases, and expressed a clear opinion that if a purchaser employed a solicitor who had any knowledge of an encumbrance affecting the property, such knowledge must, in law, be treated as communicated to the principal, although the latter might, in fact, be wholly unconscious of the existence of the encumbrance. In a case like this it is the duty of a party to inquire, and if he abstains from making any inquiry he must take the consequence. In *Nixon v. Hamilton*, 2 Dr. & Wal. 364, a solicitor prepared a deed of separation between man and wife, he fraudulently prevented it from being registered. Afterwards, acting as solicitor for the husband and for X. Y., who lent the husband money, he prepared another deed as security for X. Y.'s advances, and he inserted in this second deed the same property as that which was the subject of the separation settlement. X. Y.'s deed was registered, but it was nevertheless postponed to the prior unregistered settlement because of the knowledge of the solicitor being imputed to the client. *Lenahan v. McCabe*, 2 Ir. Eq. Rep. 342, is to the same effect. And that rule has been applied where the person has united in himself the character of owner of the property and of solicitor. In *Rorke v. Lloyd*, 13 Ir. Ch. Rep. (N. S.) 273, A., who was the owner of some land and was a solicitor, made to B. a mortgage of the land on the 20th of March, 1856, this mortgage was not registered till April 3, 1859.

A. made a lease of the same land to C. on the 7th of [*142] March, 1859, and registered *it at once, being paid by C. for his trouble as solicitor in the transaction. It was held that A. was C.'s solicitor, and that C. was affected, through him, with notice of the prior unregistered mortgage, and the lease was postponed to the mortgage. That judgment was taken to the Court of Appeal, and was there affirmed. (14 Ir. Ch. Rep. (N. S.) 442.) In *Ratcliffe v. Barnard*, L. R. 6 Ch. 652, the same rule of affecting the mortgagee through the knowledge of the solicitor was admitted, though it was not applied in that case, the Court being of opinion that there had not been any actual negligence on the part of the mortgagee's solicitor. *Kennedy v. Green*, 3 My. & K. 699 (p. 820, *post*), and *Withread v. Jordan*, 1 Y. &

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C. Ex. 303, show that where there might have been inquiry, but none has been made, constructive notice is sufficient to affect the parties.

Here, there was nothing like an advance of money, an indefinite sum was left in the hands of the husband to carry on the trade in which he and his partner had been engaged. There was no doubt private influence used to get this deed, for which, after all, there was no proof that any valid consideration had been given.

Mr. Isaac Butt, Q. C., Mr. O'Hagan, Q. C., and Mr. Romayne (all of the Irish bar) were for the respondents : —

The real question here is as to the construction of the Act of Anne. That Act (6 Anne, c. 2, Ir.) was passed in order to give effect to an object treated by the Legislature as most important, and stated in the preamble to be that of "securing purchasers, preventing forgeries and fraudulent gifts, and conveyances of lands." The 3rd section requires that "a memorial of all deeds shall be registered." The 4th section declares that all registered deeds shall be taken "as good and effectual in law and equity according to the priority of time of registering;" and the 5th section provides that "every deed not registered shall be deemed and adjudged as fraudulent and void," not only as against a registered deed, "but likewise against all and every creditors and creditor by judgment, recognisance, statute merchant, or of the staple, confessed, acknowledged, or entered into, as for and concerning all honours, lands," &c., "contained or expressed in such * memorial registered as aforesaid." Taking these [* 143] sections together it is impossible to doubt what was the intention of the Legislature, and that that intention was especially to prevent the occurrence of such a case as this. The case of *Nixon v. Hamilton*, 2 Dr. & Wal. 364, does not affect the present, for there the questions were whether the solicitor who prepared the second deed had not a full knowledge of the first, and if so, whether his knowledge must not affect his client, the second mortgagee, and in both matters an affirmative answer was given. No such answer could be given here. Barry was not the solicitor of Mrs. Barry, his position was hostile, not fiduciary, and therefore she could not be affected through his knowledge or his acts. The solicitor who prepared this deed, Mr. Oehme, was wholly ignorant of the preceding transactions between Barry and the bankers, and the deed which he prepared in honest ignorance of them was duly

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registered. The alleged equitable mortgage of the bankers was not registered; the deeds of the Gortnaclough and Crinallow estates were asked for by Mr. Oehme, the solicitor for the respondents, and an excuse, apparently reasonable and sufficient, was given to him. He throughout acted *bonâ fide*. All argument about not making an inquiry was therefore excluded. The demand here made by the appellants amounted to this, that a transaction, a secret transaction, of which nobody but the parties concerned, the bankers and Barry, could know anything, and which was not registered, was to have priority over a regular and formal deed (founded, too, upon a long previous existing liability) which had been duly registered. To give it that priority would be entirely to defeat the Statute of Anne. Even if the circumstances here were not nearly so strong as they really are in favour of the respondents, the fact of registry ought to decide the matter to their advantage. *Marjoribanks v. Horenden*, Dru. Ch. Rep. t. Sug. 11, is an authority for the respondents. Lord Chancellor SUGDEN there said (Ibid. 22): "The only difficulty is that this is a conflict between a registered and an unregistered instrument, and that in cases of registry it has been held that direct notice is requisite. I am disposed to follow those decisions, and, as between a registered and an unregistered deed, not to bind the party who [* 144] has the * legal priority by any casual circumstances, which in other cases might be considered as amounting only to constructive notice." The decision in that case, therefore, did not affect the question of the validity and force of the registry, but was owing to the fact that not merely a constructive notice to the solicitor had been proved there, but that he knew really everything connected with the transaction, and so the rule of a client being bound by the knowledge of his solicitor became applicable. In *Chadwick v. Turner*, L. R. 1 Ch. 310, it was expressly declared that a title which has been registered can only be affected by clear and distinct notice amounting, in fact, to fraud. That was a case on the Registry Act for the East Riding of Yorkshire (6 Anne, c. 35), which resembled in all its material points the other Registry Acts of that reign. In *Hewitt v. Loosemore*, 9 Hare, 449, 21 L. J. Ch. 69, though it was admitted that the knowledge of the solicitor would bind the mortgagee who employed him, yet if that solicitor was himself the mortgagor, his employer would not be bound by any uncommunicated fact which it was the

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interest of such a mortgagor to conceal from the mortgagee. Here the mortgagor was not the solicitor, but he had a real interest in concealing from the mortgagee what he had done. And that case also decided that a legal mortgagee will not be postponed to a prior equitable one on the ground that the title deeds have not been got in, unless there had been, in that respect, fraud or wilful negligence on the part of the legal mortgagee, and that neither fraud nor wilful negligence will be imputed to a mortgagee who has *bonâ fide* made an inquiry for the title deeds, and has received a reasonable excuse for their non-delivery. That case may well be taken as decisive of the present. *Wyatt v. Barwell*, 19 Ves. 435, decides that notice to avoid a registered deed must be clear, distinct, and positive; and *Ratcliffe v. Barnard*, L. R. 6 Ch. 652, shows that mere omission by the solicitor to examine all the title deeds will not be sufficient to fix the legal mortgagee with constructive notice of a prior equitable charge.

The case of *Wormald v. Maitland*, 35 L. J. Ch. 69, where it was held that constructive notice of a prior unregistered encumbrance affecting * lands in Middlesex is as effectual [* 145] as actual notice, cannot be supported. Such was the opinion of Lord Justice CHRISTIAN in this very case, founding himself on the authority of Lord Chancellor SUGDEN in *Marjoribanks v. Horenden*, and of Lord Chancellor BREWSTER in a case of *Russell v. Cushe*, decided in Trinity Term, 1867. The latter case was not reported, but it had appeared satisfactory to the LORD JUSTICE from his examination of it, as stated in Mr. Madden's work on Registration. In that case Lord Chancellor BREWSTER had expressly declined to follow the case of *Wormald v. Maitland*. *Plumb v. Flutt*, 2 Anstr. 432 (3 R. R. 605), is an early and an important case, and was referred to as such by Lord Justice CHRISTIAN. There title deeds were deposited as a security for money; a creditor of the mortgagor, fearing his immediate insolvency, not having notice of his equitable encumbrance, took a conveyance of the same premises; and this conveyance was held good. Lord Justice CHRISTIAN, quoting that case, introduced the circumstance of the existence of a registry, and expressed his opinion that a person who takes the legal estate without the deeds, has a preferable title to him who takes the deeds without the legal estate, and without even registering the agreement which constituted him an equitable mortgagee. Of course that mode of putting the matter im-

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plies an absence of fraud, and there is not the slightest ground to impute fraud in this case. The respondents knew nothing of the real circumstances and situation of Barry; he appeared to be a man of wealth; he put himself forward as such; he was believed to be purchasing estates in Ireland; he sat in Parliament as a member for an Irish county, and in every respect seemed to be a man who was to be trusted. Acting in natural confidence upon these circumstances, the respondents, to whom a large debt was justly due, and who, in this matter, were acting as trustees for the children of a deceased person, took the security of a legal mortgage and showed their faith by registering it. A merely unregistered equitable mortgage cannot be set up against a registered legal mortgage taken under such circumstances; nor can it be alleged, as in *Kennedy v. Green*, 3 My. & K. 699, or in *Whitbread v. Jordan*, 1 Y. & C. Ex. 303, that there had been wilful negligence or wilful avoiding of inquiry when the circumstances should have induced the parties to * make it.

There were no such circumstances here. This case more resembles that of *Jones v. Smith*; 1 Hare, 43, 11 L. J. Ch. 83, where Vice-Chancellor WIGRAM divided cases of constructive notice into two classes, first, where there was actual knowledge of the fact that the property was encumbered in some way, and the party about to take a security on it did not inquire in what way, so that the Court bound him by constructive notice; or secondly, cases in which the Court has been satisfied that he had designedly abstained from inquiry for the very purpose of avoiding notice. Here the respondents had not only no knowledge, but they had no suspicion, of any existing encumbrance; and they do not fall within either of those classes of cases.

Mr. Fry replied.

The LORD CHANCELLOR (Lord CAIRNS):—

My Lords, although this case has occupied a considerable time at your Lordships' bar in the very able argument which you have heard, I do not propose to detain you at length in expressing the opinion which I have been able to form upon the case.

My Lords, there are some facts in the case which appear to me to be proved beyond all possibility of dispute. The bankers obtained their security, an equitable security, in the year 1865. Mrs. Barry, the executrix, and her trustee, obtained their security and

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registered their security in the year 1866. It appears to me to be clear upon the evidence, after reading both the evidence in chief and the cross-examination, that, at the time the security of October, 1866, was given, there were undoubtedly claims existing on the part of Mrs. Barry, as executrix of her former husband's estate, against the late Mr. Barry, who was then her husband. It appears to me to be clear beyond all doubt that Mrs. Barry urged her husband to give her a security upon his property in respect of those claims, and that she repeated that demand, or that request, from time to time during the weeks or months that elapsed before the security was actually given. It further appears to me to be clear upon the evidence of Mr. Oehme, the solicitor who was appointed to prepare the security which Mr. Barry was about to give to his wife as executrix, that so far as Mr. Oehme was concerned he had actually *no notice whatever of [* 147] the prior equitable charge which had been given to the bank. And, my Lords, I am bound to say, looking at the evidence in this case, it appears to me to be entirely beyond the power of the appellants to challenge in this case the general character of Mr. Oehme, or to impute to him here any wilful participation in a fraud.

That being the state of the case as to the facts, the ground, and the only ground, which I can find alleged on the part of the appellants for the purpose of defeating altogether the security given to the executrix, is this, that Mr. Oehme did not obtain from Mr. Barry the title deeds of the estates over which the security was given, and that he did not investigate the titles to those estates. Now, as regards the title deeds, it is proved, and there is no statement to the contrary, that Mr. Oehme asked Mr. Barry for the title deeds. It is said that he asked for those deeds, not to hold them as part of the security, but, in order, by means of the contents of those title deeds, to prepare the security with more accuracy. That may be a just observation, but at the same time, asking for the title deeds in this way, he was told, in England, that the deeds were at the residence of Mr. Barry in Ireland. That was a very natural, plausible, and credible statement, and he accepted that statement; and the circumstance that he was told that they were in Ireland might account not merely for their not being produced to him, for the purpose of the preparation of the security, but also for the fact that they were not handed over to him upon the occasion of the execution of that security.

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But what your Lordships have to consider is, the effect of the circumstances to which I have referred upon a security for land situated in a country where a system and law of registration prevail. Your Lordships have been referred to the Act of Anne, which established a registry of deeds in Ireland, and your Lordships have been referred to the authorities which have been decided with reference to the state of the law of registration since the passing of that Act. My Lords, any person reading over that Act of Parliament would perhaps in the first instance conclude, as has often been said, that it was an Act absolutely decisive of priority under all circumstances, and enacting that under every circumstance that could be supposed, the deed first registered was to take ^{the} precedence of a deed which, although it might be executed before, was not registered till afterwards. But, by decisions which have now, as it seems to me, well established the law; and which it would not be, I think, expedient in any way now to call in question, it has been settled that, notwithstanding the apparent stringency of the words contained in this Act of Parliament, still if a person in Ireland registers a deed, and if at the time he registers the deed either he himself, or an agent, whose knowledge is the knowledge of his principal, has notice of an earlier deed, which, though executed, is not registered, the registration which he actually effects will not give him priority over that earlier deed. And, my Lords, I take the explanation of those decisions to be that, which was given by Lord KING in the case of *Blades v. Blades*, 1 Eq. Cas. Ab. pl. 12, p. 358, upwards of one hundred and fifty years ago, the case which was mentioned just now at your Lordships' bar. I take the explanation to be this, that inasmuch as the object of the statute is to take care that, by the fact of deeds being placed upon a register, those who come to register a subsequent deed shall be informed of the earlier title, the end and object of the statute is accomplished if the person coming to register a deed has, *ab initio*, and not by means of the register, notice of a deed affecting the property executed before his own. In that case the notoriety, which it was the object of the statute to secure, is effected, effected in a different way, but effected as absolutely in respect of the person who thus comes to register as if he had found upon the register notice of the earlier deed. If that is so, your Lordships will observe that those cases depend, and depend entirely, upon the question of

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actual notice either to the principal, or to the agent whose knowledge is the knowledge of the principal.

But, my Lords, have authorities gone any further than to the length which I have stated? Has it ever been decided, with regard to a Register Act such as that which prevails in Ireland, that negligence in not asking for the title deeds, or not taking up the title deeds, shall postpone a registered security? I am not going to say a word with regard to the effect of negligence of that kind in a country like England, where there is no general registration of deeds and no Act of Parliament like the Irish Act. But I am * unable to discover any principle upon which mere [* 149] negligence and mere failure to take all the securities that might be taken, could, in a country subject to a law like the Irish Register Act, postpone a registered deed. It appears to me that the object of such a statute as the Irish statute is to give a premium to diligence in registration; and to say that if the question is merely a question of greater or less diligence, great or less care, the advantage enures to the person who shows his diligence by first registering his own deed. Of course you may have cases in which there may be such a course of conduct as was indicated in *Kennedy v. Green*, 3 My. & K. 699, commented on in the case of *Jones v. Smith*, 1 Hare, 43, 11 L. J. Ch. 83, by Vice-Chancellor WIGRAM — conduct so reckless, so intensely negligent, that you are absolutely unable to account for it in any other way than this, that, by reason of a suspicion entertained by the person whose conduct you are examining that there was a registered deed before his, he will abstain from inquiring into the fact, because he is so satisfied that the fact exists, that he feels persuaded that if he did inquire he must find it out. My Lords, I do not wish to express any decided opinion at this moment upon a case of that kind. If such a case should arise, I do not desire to say whether, in my opinion, such a case could or could not be deemed sufficient to get rid of the provisions of the Irish Registry Act. But what I do say, with great confidence, to your Lordships is, that the present case does not resemble that; there is no such negligence here as, to my mind, carries with it any appearance of fraud. The conduct of Mr. Oelme, the solicitor in this case, appears to me to be natural under the circumstances, and not to be tainted with anything which could have even the imputation of *mala fides* cast upon it.

Well, my Lords, are there cases which bear a contrary import to

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that which I have endeavoured now to express? There is a case which was before Vice-Chancellor STUART, the case of *Wormald v. Maitland*, 35 L. J. Ch. 69; and with regard to that case I can only say, that if it is to be held as deciding, that in a register country, with such a statute as exists in Ireland, the mere circumstance that, on the occasion of a marriage, the abstract of [*150] title to the property settled *was not examined on behalf of the lady about to be married, and on behalf of the children who might be born, the mere fact that there was not this examination would postpone the registered settlement, — if that is the effect of the decision, I am unable, my Lords, to say that that is a decision which commends itself to my judgment. It appears that in the case of *Allen's Estates*, Ir. Rep. 1 Eq. 455, which was decided in Ireland, the learned Judge in the Landed Estates Court founded his decision upon this case of *Wormald v. Maitland*; but it appears, from what was said in the present case by the Lord Justice CHRISTIAN, that, at the time the learned Judge of the Landed Estates Court so decided, he was not aware that the then LORD CHANCELLOR of Ireland (Lord Chancellor BREWSTER) had, in *Russell v. Cushe*,¹ decided in opposition to the view expressed in *Wormald v. Maitland*. I cannot take, therefore, that case as an authority governing or affecting the present case; and that case being removed out of the way, there is absolutely no authority that I am aware of in support of the proposition of the appellants.

That, my Lords, would dispose of the present case, but for a question which has arisen as to the form of the decree. The decree, as it stands, does not direct a general account of all advances made, out of the estate of the testator, to the late Mr. Barry, but it directs an account upon the footing of a particular sum expressed in the bond and mortgage deed of the year 1861, a sum of £2500, or thereabouts. It assumes that that sum is part of the larger consideration stated in the deed of 1866, and directs an account upon the footing of that sum as to how much of it remains due. My Lords, I should have thought that the more regular and more convenient course would have been to direct a general account of all advances made out of the assets to, or of all assets received by, the late Mr. Barry, and if the question were here for the first time, I cannot but think that your Lordships would be disposed to direct the accounts somewhat in that manner. But, my Lords, the

¹ Not reported, but mentioned in *Madden on Registration*.

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appellants would prefer, if there is to be an account, that it should be in the form in which it has been directed in the Court below; and the respondents certainly have not *shown [* 151] their anxiety to alter the form of account by presenting any cross appeal. I am not at all prepared to admit, for a moment, that it is not competent to your Lordships, on being asked to review a decree directing an account of this kind, to consider, independently of the views of the party appealing, what is the proper form in which the account should be directed. But, at the same time, it does not appear to me that any substantial injury would be done to either party here by leaving the account in the form in which it is already directed, and which I do not think either side has strenuously urged should be altered, unless for the purpose, as the appellants contend, of having the bill dismissed altogether. I do not, therefore, propose to advise your Lordships to make any alteration in the form of the account. I notice the point lest it should be thought to have escaped your Lordships' observation, but in accordance with what I have said, I think the justice of the case will be met by simply dismissing the present appeal, and dismissing it with costs.

Lord HATHERLEY: —

My Lords, I entirely concur in the view that has been expressed by the noble and learned Lord on the woolsack as to the course which it is incumbent upon us to pursue under the peculiar circumstances of this appeal.

I confess, my Lords, that when the case was opened, as it was with great ability by Mr. Fry, I did become anxious to investigate somewhat narrowly the exact position of the parties with reference to the execution of the deed of the 5th of October, 1866. Observations were made by him, which made some impression upon my mind, as to whether *mala fides* existed in the representation of the consideration for that deed. After the full discussion that the case has since received, and after all the sifting that the evidence has undergone, I am now satisfied that, at all events on the part of Mrs. Barry, whatever might have been Mr. Barry's views or objects, there was no cognisance whatever, and there is no ground whatever to suspect her cognisance, of an account having been made out which was in itself fictitious and fraudulent.

It turns out that, beyond all dispute, deeds were executed in

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1861, to which the Court below has, I think most justly, [* 152] attributed * full validity. As far as regards all that was secured by the bond and the mortgage of 1861 there was not any question at all.

The question that arose was as to the additional amount comprised in the security of 1866. I say "the additional amount," because I have not any doubt whatever, for it is fully and clearly sworn to, and on cross-examination that statement has in no way been displaced, that the documents of 1861 did form a part of the consideration for the £31,000 secured by the documents of 1866. As to the remaining portion of that charge it was made out in a way much more open to observation. It is stated now that it was ascertained with regard to the jute manufactory, which had been carried on in partnership by Mr. Mackay and Mr. Barry, that no account of the partnership had been taken after Mr. Mackay's death — that Mr. Barry, who a year or two subsequently married the widow of Mr. Mackay, had been allowed, as surviving partner, to retain the whole of the assets — that after that time steps were taken which led to a sale of the property — and then it was, as Mrs. Barry represents very naturally, and in a mode which I think is entitled to all credit, that she began to have misgivings as to whether or not she had sufficient security for the debt which was due to her as executrix, and began to press her husband for some security for that debt.

I think there is quite enough to prove that you cannot impute to Mrs. Mackay, even if you should treat this account itself as not correctly made out, a knowledge of any fraudulent manufacture of accounts for the purpose of making out a consideration.

I think, upon this evidence, we must almost assume as a fact that the concern had been profitable, because it was sold, as everybody admits, to a company for a payment in shares, which company expected, I suppose, to receive some profits from it. We arrive, then, at the fact that Mrs. Barry must have been aware that her late husband had made certain profits; we also arrive at the fact that she had no knowledge of any part of her husband's share of the profits having been paid over, or accounted for in any way to her as executrix. There were, therefore, profits that ought to have come to her, profits that she had not received, and profits for which she was going to lose all security upon the sale [* 153] * of the business. I think, under these circumstances, it

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it is a great deal too much to say that she ought to have known that there was some erroneous statement as to the exact amount of those profits—that there were some deductions which ought to have been made which were not made. It is enough for me if I arrive at the conclusion that she might reasonably and *bonâ fide* believe that the sum due to her on the undisputed deed of 1861, and the sum due to her in respect of profits as to which she would be entitled to have security, would amount, or might reasonably be taken as far as she knew, to amount to such a sum as was included in the purchase deed.

It is not sufficient to say that she had not gone through the whole of this account if we, sitting here in judgment upon the whole of the case, can arrive at the conclusion that she might reasonably believe it to be a true and correct account. Upon that point I have satisfied myself.

Having satisfied myself of Mrs. Barry's honesty in the transaction, I then proceed to see what is the evidence that would induce your Lordships to follow decisions which would postpone the registered security of 1866 to the unregistered security granted to the appellants in 1865, on the ground that knowledge, not actually existing in Mrs. Barry's mind, must be imputed to her of the security which had been effected in 1865. Now as regards the facts of that part of the case, I have not, after carefully examining the evidence, the slightest hesitation in coming to the conclusion that Mr. Oelme knew nothing of that matter whatever. He was told that, as to the Gortnaclough and Crinallow properties, the deeds were at Lota, near Cork; the instructions being at that moment given to him in London by Mr. Barry, who was then himself in London. He farther distinctly declares, upon cross-examination, that although he soon afterwards became acquainted with the liabilities and embarrassments of Mr. Barry, he did not then know of any such embarrassment, or of Mr. Barry being in difficulties, until after the execution of the deed of the 5th of October, 1866, his first intimation, I think, having been derived from the action having been brought by or on behalf of the present appellants on the 25th of October, 1866. Why, then, should he have on his part any suspicion of any impropriety in the transaction? * He would know that there had existed [* 154] this previous partnership in the jute concern; he would know that Mr. Barry had subsequently married the widow of his

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former partner; he would know that this gentleman was desirous of giving his security, and he would have handed to him (as a matter of fact he deposes to it in his affidavit) the deed of 1861, by which he would see that security had already been taken to a certain extent, and that what was wanted was farther security for providing, to an increased extent, for the debt.

It is said, however, that his suspicions should have been aroused when certain documents were handed to him purporting to be a description of parcels taken from the very deeds, and also when the amount of the debt for which the security was to be given and prepared by him, having been originally stated to be £16,000, was afterwards stated to be £31,000. As regards the documents being copied from the deeds, it by no means necessarily follows that he should have been brought to that conclusion, or that having been told that the deeds were at Lota in Ireland, he should have said, you might have brought me these deeds to see what they were; you have taken the description of the parcels from them, and therefore, why did you not, instead of giving me the descriptions of the parcels taken from the deeds, give me the deeds themselves? It is all very well to say that now, after it is found out that this deception has been perpetrated upon the present appellants. But I apprehend that it would be going far beyond anything that is to be found in *Jones v. Smith*, 1 Hare, 43, 11 L. J. Ch. 83, or in *Hewitt v. Loosemore*, 9 Hare, 449, 21 L. J. Ch. 69, to say, that having once been told that the deeds were in Ireland, he should, after some other information was given to him, have pursued a variety of other inquiries, turning round in suspicion upon his employer and saying, you told me just now that the deeds were in Ireland; now you have produced another paper which you must have taken from them. To say that a suspicion of this sort must have crossed his mind, and that if he did not act upon this suspicion he is to be held guilty of a wilful determination not to

have his eyes opened, would be to say what is not warranted. [* 155] It would be perfectly monstrous to hold *any doctrine of that sort. He is amply relieved from that by what had previously taken place.

My Lords, although I have carefully gone into this part of the case, I wish to guard myself by saying that it is not necessary for the decision of this case, to say anything upon the distinction with regard to the doctrine of wilful ignorance, and imputation of

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knowledge, for the purpose of setting aside transactions conducted in an ordinary way in a country where no register exists, as contrasted with a country where, as in Ireland, or with places where, as in Middlesex and Yorkshire, registers do exist. I can easily conceive that a distinction may well be held to exist between the necessary searches, the omission of which will be considered by a Court as indicating wilful negligence on the part of a person preparing a security, when he has to conduct his business in the ordinary way, between vendor and purchaser, or mortgagor and mortgagee, in a country where no registration exists, and a country where a register does exist. Especially is there a distinction when he is told in the register country that everything that is not upon the register is, as against him, fraudulent and void. The purchaser registers his deed, and having placed his deed upon the register, assumes that everything he can possibly require for the purpose of his own protection is done, there not being any previous encumbrance upon the register, and he *bonâ fide* knowing of none. Then the question comes to be whether he is bound to make a strict search and inquiry, by the examination of a person coming to him to prepare a security, as to what he may know with respect to what deeds there may be outstanding, or the like. There is a very wide difference between the case of a person who has the safeguard, as he supposes, of the register for his protection, and the case of a person who has to rely only upon these ordinary means of information.

But it seems to me that it would be somewhat extraordinary to give the advantage to a person who has neglected to give the information to others which by registering he would give, and who has thereby (if this doctrine be true, that on such extremely light grounds of comparison the knowledge can be imputed to a person taking a subsequent deed), enabled his mortgagor, or vendor, to commit a fraud upon a subsequent purchaser or mortgagee.

And *it would be the more extraordinary to give him this [* 156] advantage because in the transaction a solicitor has been employed, and that solicitor may, by some negligence or other, but in perfect good faith, have omitted to make due inquiry. I say it would be an extraordinary thing to allow the person, who in the first instance has been guilty of gross negligence in not registering the deed (contrary to the words of the Act of Parliament), to obtain the advantage of priority over the person taking

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the subsequent instrument, although that person had neither himself, or through his solicitor, the slightest actual knowledge of the previous transaction, which can only be brought home to him by the doctrine of imputed or constructive notice. I must say, when the time comes for considering that question, I should like to consider it a little more fully before holding that it can give such a right as is here asserted. However, my Lords, in this case, as I have said before, I do not think any such right can be asserted as against Mr. Oehme.

Then there remains only a single question, namely, as to whether Mr. Barry is to be taken to be the agent of Mrs. Barry in this transaction, so as to fix a knowledge of the fraud upon Mrs. Barry. My Lords, it appears to me that that is directly contrary to, instead of following, the case of *Le Neve v. Le Neve*, 3 Atk. 646, Amb. 436, 1 Ves. 64. In that case Mr. Le Neve, the husband, knew everything: he employed the solicitor as Mr. Barry employed his solicitor here. Lord HARDWICKE did not stop to inquire about the position of the husband; that was a known, an acknowledged, it was an admitted fact in the case. What he said was: The husband has employed this solicitor, and I must inquire whether this solicitor knew anything of the transaction; and, finding that he did, finding that he had been consulted about, and had even assisted the husband in perpetrating the fraud, Lord HARDWICKE came to the conclusion (whether that conclusion has been repudiated by different Judges since or not) that under those circumstances, through the guilty knowledge of the solicitor, although he was innocently employed as far as regarded the lady herself, she, the lady, must be implicated, and must suffer the loss. How can that compare for one moment with

the position of the husband himself in the case? Really [*157] if the doctrine is to be carried so high as that, where is it to stop? If a person asks a friend to recommend a solicitor, who afterwards happens unfortunately to be mixed up with a fraud, under the circumstances of the case you could not deal with him as an intermediate agent, and as having that knowledge which would have served to postpone the encumbrancer.

I think, my Lords, happily, in this case we have none of those questions presented to us. It is quite sufficient for me to say that I do not think that Oehme's position has been brought within *Hewitt v. Loosemore*, or any of those other cases; and therefore I

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think that, upon every ground, Mrs. Barry is entitled to retain her security, and that this appeal should be dismissed with costs.

Lord SELBORNE: —

My Lords, I entirely agree with the opinions which your Lordships have expressed. It has been said in argument that investigation of title and inquiry after deeds is “the duty” of a purchaser or a mortgagee; and, no doubt, there are authorities (not involving any question of registry) which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing *bonâ fide* in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with *bonâ fide* dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation, must always be a question to be decided with reference to the nature and circumstances of each particular case; and among these the existence of a public registry, in a country in which a registry is established by statute, must necessarily be very material. It would, I think, my Lords, be quite inconsistent with the policy of the Register Act, which tells a purchaser or mortgagee that a prior unregistered deed is fraudulent and void as against a later registered deed, — I say it would be altogether inconsistent with that policy to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of * unregistered interests. But it is quite consis- [* 158] tent with that, that if he or his agent actually knows of the existence of such unregistered instruments when he takes his own deed, he may be estopped in equity from saying that, as to him, they are fraudulent.

With regard to the account, the appellants, failing altogether to overturn the respondents’ security, cannot be heard to ask that the form of the account shall be altered in their favour without letting in all such alterations as will be proper to make it, in all respects right, to whatever party these alterations may prove most beneficial. Rather, however, than do that, they elect that their appeal

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shall be dismissed with costs, and I think, under all the circumstances, it is proper that it should be so dismissed.

Order appealed from affirmed, and appeal dismissed with costs.
 Lords' Journals, 15th June, 1874.

ENGLISH NOTES.

Le Neve v. Le Neve has long been considered the leading case on the effect of notice. And in the notes to that case in 2 White & Tudor's L. C. Eq. 8th ed., a full treatise will be found on the law of notice. The case, however, and that of *Agra Bank v. Barry* (*supra*) are selected here as relating to land subject to a registry, and the following notes are particularly directed to cases relating to property subject to a registry, as it is considered that they will be material not only on the question of notice generally, but also on what notice will affect purchasers of land registered under the Land Transfer Acts, without an indefeasible title. Although the case of *Agra Bank v. Barry* is on the Irish Act, it is also an authority on the English Registration Acts, because, so far as regards the effect of notice, there appears to be no difference between the Irish Act, the Middlesex Act, and the old Yorkshire Acts.

The only difference in the Irish Act is that sect. 4 of the Irish Act declares that deeds shall be taken as good and effectual, both in law and equity, according to the priority of time of registering the memorial.

See the effect of this discussed also by Lord TRURO in 1852, in *Mil' v. Hill*, 3 H. L. C. 828, see pp. 853 to 855, and see *Bushell v. Bushell* (1803), 1 Sch. & Lef. p. 96, when the LORD CHANCELLOR held that the registry was not of itself notice to a man who did not search, but that if he searched he was presumed to have notice.

The facts in the ruling case of *Agra Bank v. Barry* only involved the question what neglect in failing to inquire for deeds or procure their production would be sufficient to postpone a registered purchaser to an unregistered encumbrance—no question was directly raised as to the effect of failure to investigate the usual title. The LORD CHANCELLOR (L. R. 7 H. L. 147) said: "The only ground which I can find alleged on the part of the appellants for the purpose of defeating altogether the security given to the executrix is this, that Mr. Oehme (the solicitor) did not obtain from Mr. Barry the title deeds of the estate over which the security was given and that he did not investigate the title to those estates."

It seems, however, that the investigation of title would not have disclosed anything more than the equitable deposit of deeds with the bank,

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and, according to the report in L. R. 7 H. L., the appellants only pleaded "that no inquiry was made for the title deeds and that neglect to make such inquiry was itself a legal fraud sufficient to deprive the defendants of any priority by reason of the registration of the mortgage."

It does not therefore appear that the decision in this case directly affects the doctrine which is applicable to land not subject to a registry, that a purchaser who neglects to make the usual investigation of title will be affected with notice of what he would have discovered if he had made such investigation, and although both *Agra Bank v. Barry*, and the earlier case cited in it show that stricter proof of notice is required to postpone a registered deed affecting land subject to a statutory register, than would be required in the case of land not subject to a register. The cases are not satisfactory on the question what amount of notice is requisite, or whether in such a case *constructive* notice is absolutely excluded and *actual* notice alone regarded.

In *Wyatt v. Barwell* (1815), 19 Ves. 435, 13 R. R. 236, Sir Wm. GRANT no doubt said: "That it is only by actual notice that a registered conveyance can be postponed." It is not, however, clear in the judgment that in speaking of "actual" notice he was referring to the distinction between "actual" and "constructive" notice. This decision was in 1815; none of the earlier reported cases seem to have taken the distinction between "actual" and "constructive" notice. They had established that, in order to postpone a registered deed to an unregistered encumbrance, the proof of notice must be very clear. See per Lord HARDWICKE in *Hine v. Dodd* (1741), 2 Atk. 276. They had also established that notice to the agent was sufficient to affect the plaintiff. See *Le Neve v. Le Neve*; *Lord Forbes v. Deniston* (1722) (on the Irish Act), 4 Bro. P. C. 2nd ed. by Tomline, p. 189; *Sheldon v. Cox* (1763), 2 Amb. 2nd ed. by Blunt, p. 624; see also the modern cases of *Bradley v. Riches* (1878), 9 Ch. D. 189, 47 L. J. Ch. 811, 38 L. T. 810, 26 W. R. 810, and *Re Weir* (1888), 58 L. T. 792.

But the fact that the notice to the principal is only imputed to him by notice to his agent is, as explained in the notes to *Kennedy v. Green* (p. 835, *post*), not an instance of "constructive" but "actual" notice; the agent in the absence of fraud is treated as the *alter ego* of the principal.

Excepting the case above cited, of *Wyatt v. Barwell* in 1815, there does not appear to be reported any case before *Lee v. Clutton* (1875), 32 L. T. 77, 45 L. J. Ch. 43, 24 W. R. 106, hereinafter mentioned, deciding that "actual" as distinguished from "constructive" notice was necessary to affect a person taking under a registered deed.

The decision of Lord ELDON in *Martinez v. Cooper* (1826), 2 Russ.

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198, is sometimes referred to as an instance of constructive notice affecting a purchaser of registered land, but it really turns on the question whether the negligence in that case of the prior mortgagee in giving up a deed was sufficient to postpone him, having regard to the fact that the purchaser's solicitor had notice that money was to be paid to such mortgagee; the case seems to come within the rules in *Northern Counties of England Fire Insurance Co. v. Whipp*, 10 R. C. 516.

In *Rochard v. Fulton* (1844), 1 Jo. & Lat. 413, in the case of land subject to the Irish Act, SUGDEN, L. C., held that notice to a purchaser of a registered memorial of a deed, though the memorial did not specify the particular annuity of £400, which the purchaser was taking, affected the purchaser with notice of the contents of the deed, and that it carried the annuity, though not mentioned in the memorial; this case is distinguishable from *Wyatt v. Barwell*, (*supra*), and *Lee v. Clutton*, (*infra*), on the ground that the prior deed was duly registered. But the judgment contains some important observations on the general principle. The LORD CHANCELLOR, after referring with approval to *Jolland v. Stainbridge* (*infra*), said: "I should allow no vague reports, nothing that a man might simply have been informed of. I should be very slow to visit on a purchaser anything but what is tantamount to actual notice. But it is plain that a man who has notice of a deed has notice of its contents and is bound to make inquiry."

In *Jolland v. Stainbridge* (1797), 3 Ves. 478, the facts were too special to be cited as a direct authority. But on the general principle, the MASTER OF THE ROLLS said, (see p. 486), "I regret that the statute has been broken in upon by parol evidence, and am very glad to find that Lord HARDWICKE, in *Hine v. Dodd*, says nothing short of actual fraud will do."

In *Wormald v. Maitland* (1866), 35 L. J. Ch. 69, STUART V.-C. held, in a registered county, that failure to investigate the husband's title or to inquire for the deeds, affected the trustees of the settlement with constructive notice. But this case was disapproved of by Lord HERSCHELL in the ruling case of *Agra Bank v. Barry*.

In the case of *Lee v. Clutton* (1875), 33 L. T. 77, 45 L. J. Ch. 43, 24 W. R. 106, JESSEL, M. R., in the Court of first instance, held that constructive notice would not, by reason of mere omission to inquire for deeds, be imputed to a purchaser taking under a duly registered conveyance land in a register county, and the MASTER OF THE ROLLS, in effect, laid down that to affect such a purchaser "actual" notice to him or his agent must be proved, and "constructive" notice would not be sufficient unless his conduct amounted to fraud. And the MASTER OF THE ROLLS declined to say that even this would be sufficient to postpone him.

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In this case the deeds relating to land in Middlesex had been deposited with one of the plaintiffs by way of equitable mortgage, with a memorandum of deposit which was not registered, the plaintiff took by a subsequent conveyance duly registered on a purchase. The defendant admitted knowledge that the deeds were in the custody of one of the plaintiffs, and stated that he was informed they were in his custody as owner of the largest part of the property comprised in them. The defendant searched the registry, and obtained a written statement from his trustee that the holder of the deeds had no charge, but made no inquiry of the holder. It appeared that the prior mortgage deed was registered two days before the registration of the purchaser's conveyance.

The MASTER OF THE ROLLS in his judgment, as reported in 45 L. J. Ch. p. 45, said, "On this bill there was no allegation of actual notice which was essential where, as in this case, it was attempted to assert the priority of an unregistered charge on lands in a register county. You might indeed succeed without proof of actual notice being given either to the person himself or his agent, but only when the conduct of that person had been fraudulent," . . . and after discussing several cases the MASTER OF THE ROLLS proceeded:—

"Taking, therefore, the result of the authorities, and putting them as favourably as possible for the plaintiffs, they only came to this:— That though you might avoid a registered deed in cases of actual notice, and, as a general rule, notice to a solicitor was notice to his client, it was at least doubtful if constructive notice was sufficient, but if it were so, it was only where fraud could be imputed; and where the Court knew that there was no distinct proof that the person taking the encumbrance knew of a prior encumbrance, but that he was aware that there were encumbrances, and purposely abstained from inquiry, with a view to avoid notice, a Court of equity might postpone him. That, however, he doubted."

The decision was affirmed on appeal, (see 46 L. J. Ch. 48, 35 L. T. 84, 24 W. R. 942), but only on the ground that the facts brought it within the ruling case of *Agra Bank v. Barry*, and the distinction between "actual" and "constructive" notice was not discussed.

Assuming, however, that the judgment would be followed, it was a decision in a case where the conflict was between the holder of an unregistered charge and a subsequent duly registered charge. It does not follow that a similar rule would apply where the prior charge was registered and the second purchaser either omitted to search the register or searched and did not require production of a prior registered deed.

Fine distinctions may also be taken on the question what is constructive and not actual notice. It may be held that actual notice of a

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deed clearly part of the chain of title is actual and not constructive notice of the contents, although the purchaser does not examine or know what the contents are: see the observations of SUGDEN, L. C., in *Richard v. Fulton*, *supra*.

In the *New Lion Tyre and Cycle Company v. Spilbury*, 1898, 2 Ch. 484, 67 L. J. Ch. 424, 78 L. T. 543, 46 W. R. 567, CHITTY, L. J., said actual notice is required to defeat the statutory priority acquired by registration under the Middlesex "Registry Act," but this was merely an *obiter dictum*, the decision was on the effect of sect. 87 of the Patent Act, 1883.

The Yorkshire Registries Act, 1884 (47 and 48 Vict. c. 54), sect. 14, provides, "All priorities given by this Act shall have full effect in all Courts except in cases of *actual fraud*, and all persons claiming thereunder any legal or equitable interests shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice, except in cases of *actual fraud*; but nothing in this section contained shall operate to confer upon any person claiming without valuable consideration under any person any further priority or protection than would belong to the person under whom he claims, and any disposition of land or charge on land which, if unregistered, would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner."

See *Bottison v. Hobson*, 1896, 2 Ch. 403, 65 L. J. Ch. 695, 74 L. T. 689, 44 W. R. 615, as to actual fraud under this Act, and see *Crowley v. Bergthell*, 1899, A. C. 374, 68 L. J. P. C. 81, 86 L. T. 428, as to fraud under the Natal Registry and its similarity to the English Acts.

The provisions of 18 and 19 Vict. c. 12, as to registration of annuities charged on land, are similar to those in the Middlesex, Irish, and the Old Yorkshire Acts, and the equitable doctrine of notice applies. Thus in *Greaves v. Tofield* (1880), 14 Ch. D. 563, 43 L. T. 100, 28 W. R. 840, 50 L. J. Ch. 117, a land-owner, by deed, in February, 1872, charged his land with two life annuities. He subsequently made several mortgages of the property by deeds, some of which recited the annuity deed. The annuity deed had not been registered, as required by 18 and 19 Vict. c. 15, s. 12. It was held by the Court of Appeal that as the Act 18 and 19 Vict. c. 15, s. 12, was in similar terms to the clauses in the Registry Acts which had been decided not to make an unregistered conveyance void, as against a subsequent purchaser who had notice of it, the Legislature must be taken to have used the words in the later Act in the sense as given to them by those decisions, and that the annuities therefore were valid as against all the subsequent encumbrancers who took with notice of them and against the trustee in bankruptcy of the grantor.

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JAMES, L. J., in delivering judgment in the Court of Appeal distinguished the prior sections of the Act as to judgments, decrees, and orders because of the express words that they are not to affect land "any notice notwithstanding."

Statutory provisions for registration are applicable to other kinds of property besides land.

As regards patents, sect. 87 of the Patent Act, 1883, above cited, appears to make the equitable doctrine of notice actual or constructive applicable. See the *New Lion Tyre and Cycle Company v. Spilsbury* (*supra*).

The Merchant Shipping Act, 1854 (17 and 18 Vict. c. 104), contains express provisions, section 43 excluding notices of trusts, and Section 67 enacts, "If there is more than one mortgage registered of the same ship or share therein, the mortgagees shall, notwithstanding express implied or constructive notice, be entitled in priority over one another according to the date at which each instrument is recorded in the register book, and not according to the date of each instrument itself."

It was held under this that the Court could not recognise equitable titles. *Liverpool, &c. Bank v. Turner*, 1 J. & H. 159, 2 D. F. & J. 502.

Sect. 3 of the Merchant Shipping Act of 1862 (25 and 26 Vict. c. 63), was passed, it is said, in consequence of this decision, and declared that, subject and without prejudice to the power of disposition and giving receipts of registered mortgagees, equities may be enforced against owners and a mortgagee of ships; but in *Black v. Williams*, 1895, 1 Ch. 408, 64 L. J. Ch. 137, 43 W. R. 346, VAUGHAN WILLIAMS, J., held that section 3 was to be read as incorporated in the Act of 1854 and that section 59 of that Act still gave a legal mortgagee who was duly registered priority over an unregistered prior equitable charge of which such legal mortgagee had notice. See also *The Celtic King*, 1891, P. 175, 63 L. J. P. 37, 70 L. T. 562.

In *Rolland v. Hart*, L. R. 6 Ch. 678, 40 L. J. Ch. 701, 25 L. T. 191, 19 W. R. 962, Lord HATHERLEY, referring to the contention that the law as to the purchases of lands should be rendered like that relating to Ships Registry said, "Ship Registries are of a very different character. . . . What has hitherto repressed those who have been anxious to do away with the doctrine of notice is that there would always remain a very strong feeling on the part of mankind against a person who knowing distinctly that his neighbour had lent a large sum of money took a security subject to that and then obtained priority by a previous registration."

The Companies Act of 1862 contains a provision as to notice of trusts

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and the Land Transfer Acts of 1875 and 1897 also deal with this, but the provisions are not clear.

Sect. 83, sub-sect 1, of the Land Transfer Act of 1875, is almost verbatim the same as sect. 30 of the Companies Act, 1862.

The words of this sect. 30 are, "No notice of any trust expressed, implied, or constructive shall be entered on the register or be receivable by the registrar in the case of companies under the Act and registered in England or Ireland."

The words of sect. 83, sub-sect. 1 of the Land Transfer Act of 1875, are, "There shall not be entered on the register or receivable by the registrar any notice of any trust express, implied, or constructive."

Sub-sect. 1 of sect. 83 was repealed by the Land Transfer Act of 1897 by one of the amendments in the schedule which substitutes for it the following:

"Neither the registrar nor any person dealing with registered land or a charge shall be affected with notice of a trust express, implied, or constructive, and notices of trusts shall, as far as possible, be excluded from the register."

Sect. 30 of the Companies Act of 1862 (cited, *supra*) has been the subject of decisions. In *Société Générale de Paris v. Tramways Union Co.* (1884), reported in the Court of Appeal, 14 Q. B. D. 424, and in the House of Lords, *Société Générale de Paris v. Walker*, 11 App. Cas. 20, Lord SELBORNE expressed an opinion that the rule in *Dearle v. Hall*, 3 Russ. 1, as to the effect of notice in determining the priorities of equitable rights, is inapplicable to shares in a company under the Act of 1862, but in the case of *Bradford Banking Co. v. Briggs* (1886), 12 App. Cas. 29, 56 L. J. Ch. 364, 56 L. T. 62, 35 W. R. 521. It was held that notice by the bank to the company of a deposit of shares by way of mortgage was not excluded by sect. 30, but affected the company with notice, and gave the bank priority over a lien of the company for a subsequent debt to the company of the shareholder. In this case Lord HALSBURY explained that the cited opinion of Lord SELBORNE was not necessary for the decision, and expressed his own opinion as follows, both as to sect. 30 of the Companies Act of 1862, and sect. 83 of the Land Transfer Act of 1875:

"I see some reference to the words of a noble and learned Lord (Lord SELBORNE) with respect to the proposition, that sect. 30 of the Companies Act renders it impossible for any company to be affected by notice of any trust, expressed, implied, or constructive. I was a party to the judgment of your Lordships' House in the case to which reference is made (11 App. Cas. 20); and I certainly never imagined myself to be agreeing to a decision which could establish any such proposition, and the noble and learned Lord, in whose words I have

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expressed my concurrence, gave no such reasons for his judgment. No such proposition was necessary for the decision of the case, and I wish to guard myself on the present occasion from being supposed to have so held. The words occur not only in the Companies Act, sect. 30, but also in sect. 83 of the Land Transfer Act, 1875, and if what is suggested as the true interpretation of those words were to be so determined by your Lordships' House, it would come to this, that whenever the conduct of the parties to a dealing in land had been such that a Court of equity would imply a trust, the operation of those words would be such as to shield the person registering from the jurisdiction of a Court of equity in respect of the lands so registered, though but for that section he would have been held by a Court of equity to be merely a trustee. So startling a result ought not to be arrived at without direct decision, and, as I have already said, I do not understand your Lordships ever to have decided it."

This, though a very weighty *dictum*, is only a *dictum* without argument as to the policy or details of the Acts; still, to say that either sect. 83 of the Act of 1875, or the amendments noticed (*supra*) in the schedule to the Act of 1897, protect a first registered proprietor from notice of a trust, would apparently be contrary to sect. 7 of subsect. 3 of the Act of 1875. On the other hand, it is probable that a purchaser taking for value an absolute registered title from a person registered as absolute proprietor, will not be affected by any notice which would not affect him with fraud, excepting, perhaps, notice from possession or receipt of rents within sect. 7, subsect. 2 of the Act of 1897. And as to fraud it is to be observed that the words in that subsection are "absolutely void" and not "fraudulent and void" as in sect. 98 of the Act of 1875 and that sect. 98 is in terms subject to the provisions of the Act as to registered dispositions for value. The subsection was no doubt passed to meet the case of *Gibbs v. Messer*, 1891, A. C. 248, 60 L. J. P. C. 20, 64 L. T. 237, which apparently it only partially did; see Cherry and Marigold's Land Transfer Act, p. 170. But it is not clear that it would be construed to meet such a case as that of *Crowley v. Bergtheil*, 1899, A. C. 374, 68 L. J. P. C. 81, 80 L. T. 428; the provisions for compensation in the Act of 1897 may affect the construction.

There is a difference between the cases of a person first registered as absolute proprietor and a transferee for value of such person. The first proprietor may be subject to equities arising from notice from which a subsequent purchaser may be free. See sects. 7 and 98 of the Act of 1875.

As to documents before the registration with possessory title, or the date of a qualified title, there seems to be no reason why a purchaser

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should not be affected with constructive notice in the same way as in the case of unregistered land (see sect. 32 of the Act of 1875).

AMERICAN NOTES.

"The policy of admitting evidence of actual notice to determine the right of priority is attended with all the dangers and uncertainties incident to parol evidence when used for the purchase of affecting written instruments and disturbing titles; and for this reason an expression of regret is to be found in some of the English cases that the Courts should ever have suffered the question of actual notice to be agitated against one whose conveyance is duly recorded. In thus engrafting upon the registration law exceptions to its literal import and application, in order to meet the equitable consequences of actual notice and prevent a fraudulent use of the statute, the Courts have seriously broken in upon the symmetry and impaired the effectiveness of the registry system: but an unwillingness to tolerate fraud, or to permit advantage to be taken of the law to obtain an unfair priority, has so far, with but a limited exception, continued to prevail over these objections. The rule declared by Lord HARDWICKE [in *Le Neve v. Le Neve*] has been almost universally adopted both by judicial construction of our Courts, and by the express terms of many of our American statutes." Webb on Record of Title, sect. 216. As Mr. Webb indicates, in nearly all the American states, notice will take the place of registration, either because the statutes expressly provide for it, or because the Courts, on equitable principles, so construe statutes that are silent on the subject. A large number of cases to this effect is collected in 20 Am. & Eng. Encycl. of Law, 1st ed. pp. 585-588. Mr. Webb, it will be noticed, speaks of the criticisms that have been made of the doctrine. Mr. Jones, also, in his book on The Law of Real Property in Conveyancing, sect. 1501, says: "It has been questioned whether Courts ought ever to have suffered the question of actual notice to be agitated against one whose conveyance is duly registered. The basis of the doctrine of notice is, that it is unconscientious and fraudulent to permit a junior purchaser to defeat a prior conveyance or encumbrance of which he has knowledge. But it has been doubted whether this doctrine does not give occasion to more fraud than it prevents, and whether vigilance in recording a mortgage should not be rewarded as much as vigilance in obtaining it."

In a few states recording statutes have been interpreted as rendering notice immaterial, and as making registration essential to the validity of conveyances as against third parties. Thus, in Arkansas, it is provided that "every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before." Digest, sect. 5091. And in *Jacoway v. Gault*, 20 Arkansas, 190, where the construction of this statutory provision was in question, the Court said: "A mortgage not acknowledged, or proven, and recorded, as required by the statute, though good between the parties to it, is not valid as against subsequent purchasers or encumbrancers of the mortgaged premises, though they may have actual notice of the existence of the mortgage."

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In North Carolina, the Code, sect. 1251, provides that "no deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lieth." In *Robinson v. Willoughby*, 70 North Carolina, 358, it was held that actual notice would not supply the place of registration. But see Acts of 1885, ch. 147.

So under the Ohio Revised Statutes, sect. 1133. See *Mayham v. Coombs*, 14 Ohio, 428.

In Louisiana the provision is more general. "All sales, contracts, and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of the recording." Rev. Civ. Code, art. 2266. It is well settled, under this statute, that actual notice of an unrecorded conveyance is immaterial. *Roche-reau v. Delacroix*, 26 Louisiana Annual, 584.

In the great majority of states, however, a purchaser or encumbrancer who has notice of a prior unrecorded conveyance cannot claim protection under the recording statutes. In applying this doctrine the only difficulty is in determining what amounts to notice.

In some states the statutes require that a subsequent purchaser shall have actual notice of a prior unrecorded deed, in order to be affected by it, but the decisions as to what will amount to actual notice are by no means uniform. In Massachusetts the requirement has been applied with great strictness. Open and notorious occupation, or other facts which would reasonably put a purchaser on inquiry have been held not enough. *Pomroy v. Stevens*, 11 Metcalf (Mass.), 244; *Mara v. Pierce*, 9 Gray (Mass.), 306; *Parker v. Osgood*, 3 Allen (Mass.), 487. So in Indiana. *Crassen v. Sworeland*, 22 Indiana, 421. See, also, Wade, *The Law of Notice*, 2nd ed. sect. 245.

In *Pomroy v. Stevens*, *supra*, WILDE, J., speaking for the Court, said: "Before the Rev. Sts. c. 59, sect. 28, the open and notorious possession and improvement of real estate, by a party entering under a deed not registered, was, in general, sufficient evidence from which notice of such deed might be inferred or implied, so as to avoid a subsequent deed or attachment. But to have that effect, the evidence must have been such as to render the inference not merely probable, but necessary and unquestionable. *M'Mechan v. Griffing*, 3 Pick. 149. But since the Rev. Sts. c. 59, sect. 28, no implied or constructive notice of an unregistered deed can avoid a subsequent deed or attachment. The statute expressly provides that no conveyance of real estate shall be valid and effectual against any person other than the grantor and his heirs and devisees, and persons having actual notice thereof, unless it is made by a deed recorded as the statute directs. Since this provision, no implied or constructive notice of an unregistered deed will give it validity against a subsequent purchaser or attaching creditor. It is not sufficient to prove facts that would reasonably put him on inquiry. He is not bound to inquire; but the party relying on an unregistered deed, against a subsequent purchaser or attaching creditor, must prove that the latter had actual notice or knowledge

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of such deed. The evidence offered was clearly insufficient to prove any such notice or knowledge. A tenant for years, or at will, may have possession of real estate, and may build fences and make other improvements thereon; or a party may have possession, and make improvements, without any title by deed or by lease."

In *Lamb v. Pierce*, 113 Massachusetts, 72, the Court went so far as to hold that knowledge of a sale, without knowledge of the deed, was insufficient. "The report finds that the plaintiff had no notice of the deed to the defendant. His knowledge that the defendant had bought the wood at auction, without proof that he had notice that the sale had been consummated by a conveyance to the purchaser, is not sufficient. The statute requires proof of actual notice of the deed."

But evidence of constructive notice from possession and cultivation by the holder of the unrecorded deed is competent in connection with evidence of actual notice. *Sibley v. Leffingwell*, 8 Allen (Mass.), 584.

And actual notice does not mean such knowledge as the purchaser would acquire from seeing the prior deed, or being told thereof by the grantor, but is such knowledge as men usually act upon in the ordinary affairs of life. *Curtis v. Mandy*, 3 Metcalf (Mass.), 405. Thus, in *George v. Kent*, 7 Allen (Mass.), 16, it was held that a deed to A., describing the land conveyed as bounded on land of B., gave A. sufficient notice of an unrecorded deed of the adjoining land to B.

In most states where the statute requires actual notice, the Courts go far in the direction of imputing knowledge to the purchaser from circumstances sufficient to put him on inquiry. These Courts, "in furtherance of the liberal construction given for the benefit of the grantee whose deed is unrecorded, hold that any fact coming to the knowledge of the subsequent purchaser, sufficient to put a man of ordinary prudence upon inquiry, and which, if followed out, would lead to express notice of the unregistered conveyance or claim, is sufficient to invalidate the subsequent deed, notwithstanding the provisions of the registry laws. Notice is imputed to him on account of his negligence in not prosecuting his inquiries in the direction indicated." Wade, *The Law of Notice*, 2nd ed. sect. 246, citing many cases. See also 2 Pomeroy, *Equity Jurisdiction*, 2nd ed. sect. 664, n. 3; Jones on *Law of Real Property in Conveyancing*, sect. 1511; *Maupin v. Emmons*, 47 Missouri, 304; *Brinkman v. Jones*, 44 Wisconsin, 498.

"If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids the inquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained. He has no right to shut his eyes against the light before him. He does a wrong not to heed the 'signs and signals' seen by him. It may be well concluded that he is avoiding notice of that which he in reality believes or knows. Actual notice of facts which, to the mind of a prudent man, indicate notice, is proof of notice." PETERS, Ch. J., in *Knappe v. Bailey*, 79 Maine, 195, 204.

In *Vaughn v. Tracy*, 22 Missouri, 415, it was held that, while possession of land under an unrecorded deed is not, as matter of law, actual notice to a

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subsequent purchaser, within the Registry Act, it is *evidence* of notice to be submitted to the jury. The Court said: "The notice required by the statute is not certain knowledge, but such information as men generally act upon in the transactions of life. (*Curtis v. Mundy*, 3 Met. 405.) And in our state, where the land is generally in the occupation of the owners in fee, it would seem that, if knowledge is brought home to the purchaser that a third person is in the possession and apparent ownership of the land, it ought, under ordinary circumstances, to be deemed sufficient information to the second purchaser that the possessor is the owner in fee, under a title derived from the former owner. It is true, the circumstances may be such as to show conclusively that the purchaser did not, in fact, know that any one was in possession, or if he did know it, the possessor may have disclaimed the ownership; and, in such cases, the jury, of course, could not find the fact of actual notice. It is quite a mistake to suppose, because the statute requires actual notice, that therefore it can only be proved by direct evidence."

Mr. Pomeroy points out that the Courts which adopt this view do no real violence to the meaning of the words "actual notice." He says: "When a Court or jury find notice as a conclusion of fact from circumstances tending to show it which should put a prudent man upon inquiry, such notice is actual as truly as though it was proved by direct evidence. It is actual, and not constructive, because, although inferred from circumstances, it is inferred by mere process of argument, and not by means of any legal presumptions. If the party thus put upon inquiry neglects to prosecute the inquiry, the conclusion of fact is then absolute, since the circumstances are left unexplained and the natural inference from them is left unanswered and unweakened." 2 Equity Jurisprudence, 2nd ed. sect. 596, n. 1, p. 816.

In any state, it would be held that where an instrument in the chain of title refers to some other instrument as affecting the rights of the parties, all persons claiming through that chain of title will be affected with notice of the contents of the instrument referred to, though it is not recorded. (*Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 29 Federal Reporter (U. S.), 546; *Anna Lije Ins. Co. v. Bishop*, 69 Iowa, 615; *White v. Foster*, 102 Massachusetts, 375; *Baker v. Mather*, 25 Michigan, 51; *Chilts v. Clark*, 3 Barbour Chanc. (N. Y.), 52; 49 American Decisions, 164; *Durham v. Dey*, 15 Johnson (N. Y.), 555.

In those states where the statutes do not require actual notice, the Courts are naturally liberal in holding constructive notice to be sufficient. See Jones on Law of Real Property in Conveyancing, sects. 1544 *et seq.*; and, on the nature of constructive notice, the American Notes to the preceding rule.

Thus the cases are exceedingly numerous to the effect that possession of land by the holder of an unrecorded deed is equivalent to the actual recording of such deed. Jones, *supra.*, sect. 1563, with full collection of authorities.

Whether one who purchases by a quitclaim deed is a purchaser without notice, within the meaning of the Registry Acts, is a question upon which the authorities are not uniform. In many cases it has been held that one taking such a deed acquires only such interest as his grantor actually had at the time, and hence his rights are subject to those of persons holding prior un-

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recorded deeds. "The very terms of the deed are notice of the existence of the rights which have been conferred upon such prior grantee, or any other person." *BERRY, J.*, in *Marshall v. Roberts*, 18 Minnesota, 495. See also *Smith v. Branch Bank*, 21 Alabama, 125; *Snow v. Lake*, 20 Florida, 656; 51 American Reports, 625; *Peters v. Cartier*, 80 Michigan, 124; *Baker v. Woodward*, 12 Oregon, 3; and many other cases cited in *Jones, op. cit.*, sect. 1396, n. 6.

The prevailing view, however, is that a grantee by a quitclaim deed is entitled to the protection of the registry laws equally with one who holds under a warranty deed. In *Dow v. Whitney*, 147 Massachusetts, 1 MORRIS, Ch. J., speaking for the Court, stated the reasons for this doctrine as follows: "A deed of 'all the right, title, and interest,' or of 'all the interest' of the grantor in a lot of land, conveys the same title as a deed of the land. It is the policy of our laws that a purchaser of land by examining the registry of deeds may ascertain the title of his grantor. If there is no recorded deed, he has the right to assume that the record title is the true title. The law has established the rule, for the protection of creditors and purchasers, that an unrecorded deed, if unknown to them, is as to them a mere nullity. The reasons for the rule apply with equal force in the case of a deed of the grantee's right, title, and interest, as in that of a deed of the land. We are of opinion, therefore, that the deed of Stephen Dow conveyed to his grantee a title which is good against any prior deed, if unrecorded. To hold otherwise would defeat the purpose of the registration laws, and create confusion in the titles to land."

So, in a recent case in the Supreme Court of the United States, *Moelle v. Sherwood*, 148 United States, 21, FIELD, J., delivering the opinion of the Court, said: "The doctrine expressed in many cases that the grantee in a quitclaim deed cannot be treated as a *bonâ fide* purchaser does not seem to rest upon any sound principle. It is asserted upon the assumption that the form of the instrument, that the grantor merely releases to the grantee his claim, whatever it may be, without any warranty of its value, or only passes whatever interest he may have at the time, indicates that there may be other and outstanding claims or interests which may possibly affect the title of the property, and, therefore, it is said that the grantee, in accepting a conveyance of that kind, cannot be a *bonâ fide* purchaser and entitled to protection as such; and that he is in fact thus notified by his grantor that there may be some defect in his title and he must take it at his risk. This assumption we do not think justified by the language of such deeds or the general opinion of conveyancers. . . . In many parts of the country a quitclaim or a simple conveyance of the grantor's interest is the common form in which the transfer of real estate is made. A deed in that form is, in such cases, as effectual to divest and transfer as complete title as any other form of conveyance. There is in this country no difference in their efficacy and operative force between conveyances in the form of release and quitclaim, and those in the form of grant, bargain, and sale. If the grantor in either case at the time of the execution of his deed possesses any claim to or interest in the property it passes to the grantee. In the one case, that of bargain and sale, he im-

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pliedly asserts the possession of a claim to or interest in the property, for it is the property itself which he sells and undertakes to convey. In the other case, that of quitclaim, the grantor affirms nothing as to the ownership, and undertakes only a release of any claim to or interest in the premises which he may possess without asserting the ownership of either. If in either case the grantee takes the deed with notice of an outstanding conveyance of the premises from the grantor, or of the execution by him of obligations to make such conveyance of the premises, or to create a lien thereon, he takes the property subject to the operation of such outstanding conveyance and obligation, and cannot claim protection against them as a *bonâ fide* purchaser. But, in either case, if the grantee takes the deed without notice of such outstanding conveyance or obligation respecting the property, or notice of facts which, if followed up, would lead to a knowledge of such outstanding conveyance or equity, he is entitled to protection as a *bonâ fide* purchaser upon showing that the consideration stipulated has been paid, and that such consideration was a fair price for the claim or interest designated."

See further, *Frey v. Clifford*, 41 California, 335; *Brown v. Banner Coal & Oil Co.*, 97 Illinois, 211; 37 American Reports, 105; *Strong v. Lynn*, 38 Minnesota, 315; *For v. Hall*, 74 Missouri, 315; 41 American Reports, 316; *Cutler v. James*, 64 Wisconsin, 173; 54 American Reports, 603; and numerous other cases cited by Jones on Real Property sect. 1394.

Where a deed contains no particular description of the land conveyed, but only a general description, such as "all my land," or "all the land I have in Boston," or other similar general description, it does not take precedence of prior unrecorded deeds of the grantor. Thus, in *Adams v. Cuddy*, 13 Pickering (Mass.), 460, where the owner of a tract of land in Boston conveyed a part of it, describing such portion by metes and bounds, and subsequently executed another deed, conveying "all the right and title to the land I have in Boston" to a second grantee, which was recorded before the prior deed, it was held that the portion of land described in the prior deed did not pass to the second grantee. See also *Butterfield v. Smith*, 11 Illinois, 485; *Hamilton v. Doolittle*, 37 Illinois, 473; *Callanan v. Merrill*, 81 Iowa, 73; *Jamaica Pond Aqueduct Corporation v. Chandler*, 9 Allen (Mass.), 159; *Fitzgerald v. Libby*, 142 Massachusetts, 235; *Eaton v. Trowbridge*, 38 Michigan, 454.

No. 7. — KENNEDY v. GREEN.

(1834.)

RULE.

NOTICE to a solicitor or agent in the same transaction implies notice to the client or principal. The implication cannot be rebutted by proof that the solicitor or agent did not communicate the notice to his client or principal.

The implication may be rebutted if it is shown that the transaction of which notice is to be imputed, was itself a fraud of the solicitor.

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3 Myl. & Keen, 699-724 (41 R. R. 176).

Notice to Solicitor implies Notice to Principal. — Fraud of the Solicitor.

[699] Where one solicitor is employed in a mortgage transaction, he is to be considered as solicitor both for mortgagee and mortgagor, and notice to such solicitor is notice to the mortgagee: and where the solicitor was himself the author of a fraud which affected the title, and the fraud was committed under circumstances, apparent upon the face of the deed fraudulently obtained, which would have excited the suspicion of a professional man, and have led to inquiry, it was held at the Rolls, first, that the mortgagee was as fully affected with notice of the actual fraud, as if the fraud had been committed by a third person, and the knowledge of it acquired by the solicitor. Secondly, that the circumstances, under which the fraud was committed, were sufficient to fix the mortgagee with constructive notice, and that if, in any mortgage or other transaction, a party does not use the precaution, which common prudence requires, to employ a solicitor, he is in the same situation with respect to constructive notice, as he would have been, if he had employed a solicitor.

The decision was affirmed, upon appeal, on the second ground, the Lord CHANCELLOR being of opinion that the mortgagee was not fixed with actual notice of the fraud, which, though known of course to his solicitor who was the perpetrator of the fraud, it was equally certain that the solicitor would conceal.

The bill was filed by Hester Kennedy, widow, against George Green and John Bethell, the assignees of James Bethune Bostock, and against Robert Kirby; and it prayed that a deed of assign-

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ment alleged to have been executed by the plaintiff in favour of James B. Bostock might be declared fraudulent and void, and that the premises comprised therein might be re-assigned to her; and, in case it should appear to the Court that the defendant Kirby was entitled to priority over the plaintiff in respect of any assignment made to him of the said premises by James B. Bostock, that the plaintiff might be declared entitled to redeem the same.

The facts stated by the bill and proved by the evidence were that in the year 1824, James Bethune Bostock was employed by the plaintiff, who resided at Ipswich, as her solicitor, to sell out a sum of £9000 3 per cent Bank Consolidated Annuities, then standing in her name, and to look out for mortgage securities on which she might invest moneys to the amount of £9000 sterling. Bostock did, accordingly, sell out the stock, * which produced the sum of £8414 1s., and he received [* 700] from the plaintiff the further sum of £585 19s., making together the sum of £9000 sterling, which was to be invested on mortgage. Bostock was the original lessee of certain pieces of ground situate near Kennington Common, of which, on the 15th of January, 1825, he had granted two buildings under-leases for terms of seventy-nine years and a half, wanting ten days, respectively, one at the rent of £31 per annum to Joseph White, and the other at the rent of £25 per annum to Thomas Kitson, who afterwards assigned his interest in the same to White. In the same month of January, 1825, Bostock, on behalf of the plaintiff, agreed to advance to White the sum of £3000 on the security of these two leases; and by an indenture, dated the 21st of January in that year, between White of the one part, and the plaintiff Hester Kennedy of the other part, reciting the leases made by Bostock to White and Kitson respectively, and the assignment of Kitson's lease to White, it was witnessed, that in consideration of the sum of £3000 therein expressed to be advanced to White by the plaintiff, White assigned to the plaintiff, her executors, administrators, and assigns, the respective pieces or parcels of ground, messuages, and premises comprised in the two indentures of lease, subject to redemption on repayment of the £3000, with interest for the same at 5 per cent.

In the month of March, 1825, Bostock wrote a letter to the plaintiff, stating that a mortgage for the sum of £3000 had been completed; and in the month of April following he wrote another

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letter to the plaintiff, purporting to contain an account of the application of the whole sum of £9000, and stating that the additional income arising from the investment would be upwards of £160 per annum more than she had previously received; [* 701] that the securities were most ample, and that *the strictest punctuality would be observed in the payment of the interest.

The plaintiff received from Bostock the interest upon the sum advanced to White, and upon the other sums alleged to be invested on mortgage, until the month of March, 1828.

In that month Bostock wrote a letter to the plaintiff, in which he stated that he should in a few days be near Ipswich, the place of her residence, and that he would take the opportunity of paying her a visit. Bostock, shortly afterwards, arrived at the house of the plaintiff: and after partaking of breakfast with the plaintiff and some friends who were staying at her house, he stated that he had some business to transact with the plaintiff; and, after mentioning that one of the mortgagors to whom part of the plaintiff's money had been advanced was rather irregular in paying his interest, he produced a parchment writing, which he said it was necessary for the plaintiff to sign in order to make the principal and interest in such mortgage more secure, and to compel the mortgagor, under a heavy penalty, to be punctual in the payment of the interest as it became due. The plaintiff, without reading or examining the instrument presented to her, signed her name in compliance with Bostock's request, in the places pointed out by Bostock; and Captain James M'Farland and his wife, who were the friends of the plaintiff staying with her in her house, also wrote their names, as attesting witnesses, in the parts of the instrument pointed out by Bostock.

The instrument, to which the execution of the plaintiff was thus obtained, purported to be a deed of assignment, dated the [* 702] 26th of March, 1828, whereby, after *reciting the indentures of lease by Bostock to White and Kitson, and the assignment by Kitson to White, and the assignment by way of mortgage of the 21st of January, 1825, by White to the plaintiff, and further reciting that Bostock was about to become the purchaser of the premises comprised in the mortgage to the plaintiff, and that there was then due and owing to her for principal and interest the sum of £3046 17s., and that Bostock was desirous of

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purchasing the mortgage, it was witnessed that, in consideration of the sum of £3046 17s. therein expressed to be paid to the plaintiff by Bostock, the plaintiff assigned the mortgaged premises, and all the estate, right, title, and term of years of her, the plaintiff, in the said mortgaged premises to Bostock, his executors, administrators, and assigns, to hold the same for the residue of the terms of years granted by the indentures of lease respectively. And on the back of the instrument was indorsed a receipt, to which were annexed the signature of the plaintiff and the attestation of Captain M'Farland and his wife, purporting to be an acknowledgment by the plaintiff of her having received from Bostock the sum of £3046 17s. The receipt for the consideration money was not, as usual, written by the stationer, but by Bostock; nor was it in the usual place, which is at the upper extremity of the left-hand square formed by the fold of the deed, but much lower down, so that there was a space reserved for writing the receipt, if it were not written before the plaintiff signed her name; or if written before the plaintiff wrote her name in that part of the parchment, the deed might have been presented to her in a folded form, so that she would not have observed the receipt.

In the month of February, 1827, a commission of bankrupt was issued against White, the sub-lessee and *mort- [* 703] gagee; and Bostock afterwards contracted with the assignees, appointed under White's commission, for the purchase of the bankrupt's equity of redemption, and that equity of redemption was conveyed to Bostock by a deed, dated the 18th of April, 1828, which contained a recital that the plaintiff's mortgage had been paid off by Bostock, and that she had by an indenture, dated the 26th of March, 1828, in consideration of the principal and interest then due to her having been paid by Bostock, assigned the premises to Bostock for the residue of the term granted by the two indentures of lease therein recited.

Some time afterwards Bostock applied to the defendant Joseph Kirby, who was his father-in-law, to advance to him the sum of £2000 on the security of the leasehold premises; and by an indenture, dated the 7th of August, 1829, and made between Bostock of the one part, and the defendant Joseph Kirby of the other part, after reciting the lease by Bostock to White, and the lease by Bostock to Kitson, and further reciting that by divers acts and assurances in the law Bostock had become and then was

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absolutely entitled to all the residue of the several terms granted by the said therein recited indentures of lease, and that the defendant Kirby had agreed to advance to Bostock the sum of £2000 on the terms and security thereafter expressed, it was witnessed that, in consideration of £2000 paid to Bostock by the defendant Kirby, Bostock assigned to the defendant Kirby, his executors, administrators, and assigns, all the premises comprised in the said recited indentures of lease, and all the estate, term, &c., of Bostock in the same, to hold the same to the defendant Kirby, his executors, &c., for the residue of the unexpired terms, upon trust to secure to the defendant Kirby, his executors, &c., the payment by Bostock, his heirs, executors, &c., of the £2000 [* 704] and interest at 5 per cent. And the deed gave a power of sale to the defendant Kirby, his executors, &c., in case of default in payment of the principal sum at the time appointed for the payment of the same, and also a power to raise any sum by mortgage, and afterwards to sell the leasehold premises, if Kirby, his executors, &c., should think fit.

In the month of June, 1831, default having been made in payment to the plaintiff of the interest of the £3000 advanced to White, the plaintiff called upon Bostock to send to her the title-deeds relating to White's mortgage, and to procure the repayment of the mortgage-money. Bostock sent a letter in answer to the plaintiff, stating that the arrear of interest would be shortly paid, and that the title-deeds would be sent to her as soon as a transfer of the mortgage was effected.

On the 9th of June, 1831, a fiat in bankruptcy was issued against Bostock, to which he did not surrender, having in fact absconded; and he was duly declared a bankrupt, and the defendants Green and Bethell were appointed his assignees.

The bill was filed on the 10th of July, 1832: it charged that no debt was really due from Bostock to the defendant Kirby, his father-in-law, but that the assignment to Kirby was executed fraudulently, and with a view to defeat the claim of the plaintiff; and that, at the time when such assignment was executed, Kirby or his solicitor had notice of the previous assignment of the mortgaged premises to the plaintiff, and knew that the sum of £3000 and interest was still due to the plaintiff.

The defendant Kirby, by his answer, stated that Bostock, when he applied to him for the loan of £2000 upon the security

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of the leasehold premises in question, * delivered over to [* 705] him the title-deeds relating thereto; and that he, the defendant, felt himself competent from his own knowledge and experience in such transactions to examine the same and make himself master of the title without any professional assistance; and that, if he had found anything which he could not comprehend, he should have applied to Mr. Kearsey, whom he considered as his solicitor, and whom he had employed before he became acquainted with his son-in-law Bostock; that he, the defendant, had been in possession of the title-deeds from August, 1829, until May, 1832, without any claim being made on the part of the plaintiff, and without any suspicion of the plaintiff or any other person having any claim in opposition to his rights. The defendant denied that he had employed Bostock as his solicitor; and he stated that, on default of payment by Bostock of the sum of £2000 at the time appointed in the indenture of the 7th of August, 1829, he had caused notice to be served upon Bostock, previous to the filing of the plaintiff's bill, requiring him to pay the principal money and interest due on the defendant's security, or that he, the defendant, should proceed to a sale; but that no sale had been made, or was intended to be made; and the defendant insisted that he was entitled to hold the premises comprised in his mortgage, as a security for the repayment of the principal sum and interest due, in priority to the plaintiff. The defendant did not know whether Bostock was ever let into possession of the premises in question, or into the receipt of the rents and profits thereof, but was informed by Bostock that he was in possession. The defendant denied all knowledge of or participation in the fraud alleged to have been committed by Bostock, and he insisted that the receipt on the back of the deed was in the usual form; and he stated that he believed that the whole width of the upper part of the deed, comprising the first * and [* 706] second folds, was exposed to the view of the plaintiff and witnesses at the time the receipt was signed and attested, inasmuch as parts of letters composing the words written by the plaintiff and the witnesses were in the upper division of the parchment made by the fold, and other parts of the same letters in the lower division.

It appeared by the evidence of the law-stationer, by whose assistant the indenture of the 26th of March, 1828, was engrossed,

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that it is the usual practice for law-stationers to indorse receipts for the consideration money expressed in the deed at the upper part of the left-hand corner of the back of the engrossment, unless instructions were given to the contrary; and that this indorsement was not made on the deed in question before it was returned to the person for whom it was engrossed. Several experienced solicitors were examined, who deposed that the unusual circumstances attending the receipt and the form of the deed itself, would have so much excited their suspicion, that they would not have suffered any client of theirs to become a mortgagee under Bostock without further inquiry. The deed purported to be an assignment of a mortgage, and bore only a common deed stamp; but, instead of assigning the mortgage debt, it assigned the premises charged with the debt; and it did not assign the mortgage deed, or contain the usual powers to the assignee to recover and receive the debt. It, moreover, recited that Bostock had agreed to purchase the mortgaged premises of Mrs. Kennedy; and if it had been really a purchase either of the mortgage debt, or of the mortgaged premises, it would have required an *ad valorem* stamp.

The questions raised in the cause were, first, whether, supposing the legal estate of the mortgaged premises to be vested [* 707] in the defendant Kirby, Bostock was to be * considered as the solicitor of Kirby, and Kirby, therefore, affected with actual notice of the fraud committed upon the plaintiff; secondly, whether, if Kirby had not actual notice, the unusual circumstances attending the receipt, and the unusual and irregular contents of the deed, did not amount to implied notice of the fraud.

[After argument]:

Sir John LEACH, M. R.: —

[711] By this bill Mrs. Kennedy complains that, by her great confidence in Bostock, and by the gross abuse of that confidence on his part, she was induced to assign to him, not her actual right and interest in the mortgage, but her legal or apparent title. This legal and apparent title Bostock afterwards assigned by way of mortgage to the defendant Kirby; and the bill asserts that Mr. Kirby, at the time he took this legal or apparent title, contrary to the actual right and interest of Mrs. Kennedy, had either actual notice of the fraud committed by Bostock, or, if not actual notice of the fraud, had notice of circumstances which

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imposed upon him the necessity of inquiry, which, with due care and diligence, would have led to a full knowledge of the fraud; and the question before the Court is, whether the assertions thus made in the bill have or have not been established in the progress of the cause; and I am of opinion that they have been completely established.

Upon the question of actual notice, it must be admitted that notice to the agent or solicitor is notice to the principal. In all mortgage transactions, the solicitor * of the mortgagee [*712] is the person employed in the preparation of the security; and it is fit that it should be so, because it is his money that is advanced, and it is his interest that is to be protected. The mortgagee here was the father-in-law of the mortgagor, and being the father-in-law of the mortgagor, he employs no other solicitor than his son-in-law Bostock, who was himself a solicitor. Having, in the common course of business, been in the habit of employing a different solicitor, in this transaction he entrusts Bostock as his sole solicitor, and Bostock must be considered as the solicitor of the mortgagee, as well as acting for himself the mortgagor. If Bostock is to be considered as the solicitor of the mortgagee, it is impossible to deny notice. It is said, that this is a case similar to those in which the Court has declared that a client is not to be affected by notice of a solicitor in a prior transaction. This case has no analogy to that principle. Bostock is here to be considered as if, in this transaction, notice had been given to him by a third person of the fraud committed upon Mrs. Kennedy. If Bostock, acting both for the mortgagee and mortgagor, had received notice of a fraud thus committed upon Mrs. Kennedy by a third person, it would plainly have been notice to Kirby; and Bostock being in full possession of knowledge of the fraud, because he was himself the author of it, Kirby is as much affected by his solicitor's knowledge of the fraud as if the solicitor had acquired that knowledge from a third person. Upon that ground alone, if there were no other, I should consider the defendant Kirby as affected with full notice of the actual fraud.

There is, however, another ground. I have stated that the question is not only whether there is actual notice, but whether there is a knowledge of those circumstances, which, if reasonable diligence had been * used, would have led to [*713] a knowledge of the fraud. I am of opinion, here, that the

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defendant Kirby is fixed with notice of those circumstances which would have led to a knowledge of the fraud. It is said that Kirby employed no solicitor, and that he, therefore, is not to be fixed with those circumstances apparent upon the deeds, which would have led other persons to indulge suspicion. Such a proposition is not to be entertained in any Court of justice. A man is not to avoid the consequences of a want of due diligence, by stating that he has neglected those means, which would have been required, if he had used reasonable caution. If the defendant Kirby, not considering Bostock as his solicitor, had employed another solicitor, he would have been fixed with implied notice from the circumstances arising from the deeds in question, and he cannot protect himself from such implied notice, by not having used the ordinary caution of employing a solicitor to protect his interest. The perusal of the deeds would have led every man of business to the conclusion that there was something irregular; and the nature of this transaction would, therefore, have induced an inquiry, which, if pursued with reasonable diligence, would have led, by reference to Mrs. Kennedy the plaintiff, to a full knowledge of the circumstances under which she had been induced to assign her interest to Bostock.

The defendant, Kirby, must therefore assign his mortgage to the plaintiff Mrs. Kennedy, and must pay the costs of the suit.

The cause was reheard before the LORD CHANCELLOR.

[714] The Solicitor-General, Sir William Horne, and Mr. Gridlstone, Jr., in support of the decree.

Sir Edward Sugden, Mr. Wigram, and Mr. Hughes, *contrâ*.

Mr. Bethell, for the assignees of Bostock.

Lord BROUGHAM, L. C.: —

This case, from the peculiar circumstances of fraud which belong to it, and from the hardship in which the Court is placed of throwing the consequences of the injury worked by the guilt of the wrongdoer upon one of two equally innocent persons, has naturally excited considerable interest both below and here. Much has been said of the late MASTER OF THE ROLLS's habitual dislike of fraudulent transactions, a feeling which I hope and trust his Honour shared with all other Judges, as he certainly did with all good and honourable men. But it seems to be supposed that he carried this feeling so far as to let it affect his judgment,

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and make him draw false conclusions from facts — nay, for, unless this further step is made, it explains nothing here — that his indignation against wrongdoers caused him to conceive like feeling against the innocent, and in search of a victim, because a wrong had been done, involve the blameless with the guilty, and even punish the victims for the injury which had been done by the wicked against themselves. In such feelings I hope and trust no Judge ever does indulge. I am confident the late MASTER OF THE ROLLS did not. I know that, were I to bring such to the decision of this case, I should be working the grossest and most unpardonable injustice. Mrs. Kennedy is innocent; Mr. Kirby is innocent; both are dupes and * victims; the [* 715] connection by marriage between the latter and the wrongdoer is only an additional misfortune, and surely no fault; and the only question is, which of the two in this Court, and as far as equitable relief extends, shall suffer the consequences of the crime. If either has been guilty of negligence, that, though blameless, must be recorded against them and affect their claims; and that must be taken into account with all the rest of the facts in the case.

These are few and simple, nor are they at all in dispute between the parties.

James Bethune Bostock was the solicitor of the plaintiff, Mrs. Hester Kennedy, an elderly lady, but in the full enjoyment of her faculties: and he was employed by her with a more than ordinary share of confidence reposed in him. This he grossly abused. Finding it necessary, for the purpose of enabling him to obtain money from Mr. Kirby, the defendant, his father-in-law, to get from her an assignment of a mortgage for above £3000, he caused a deed to be prepared, and employed a stationer, to whom he was apparently unknown, for he paid ready money for the engrossment, and received it back without the title of the instrument indorsed on the usual place, and in the accustomed engrossing hand. He then carried it to his client, and obtained her signature and seal and execution on the face of the deed, at the foot, in the ordinary way. Captain and Mrs. M'Farland subscribed on the back the usual attestations as witnesses: and there appears further on the back a very extraordinary receipt for the whole money, signed also by Hester Kennedy, and witnessed by the M'Farlands.

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[* 716] * In all deeds the receipt is put on the upper of the squares, formed by folding the parchment; or, if the deed is executed before the folding, it is still at the top, in order to prevent any fraudulent addition being made after the party shall have signed the receipt. But here the receipt is written not only far down the skin; it is written at the very bottom of the upper left hand square, so that there might have been anything prefixed, and then the word "further" added to connect it with what follows, and what is signed.

Again, the name is always signed immediately after the receipt, and on the same square, and above the fold. But here, for the first time, we see the receipt on one square and the name on the one below, so that no one can look at the instrument without perceiving that the party might have signed it when folded up, and when no part of the receipt had been written on the skin. I pass over the other lesser singularities of part of the receipt, and part of the name being written laterally on one square and part of each on another.

Now it is said that all this is not sufficient evidence to convict Bostock of fraud, and that it does not raise more than a suspicion; that it is only consistent with the supposition of fraud, but that it does not prove in what manner Mrs. Kennedy's signature was obtained. For all that the subscribing witnesses swear is, that they have no knowledge or recollection of any receipt or anything written above the place where Mrs. Kennedy and themselves signed what is now the receipt. To one very material circumstance, however, they both distinctly swear; that no money passed, and that nothing whatever was said about any money or receipt of anything on the occasion. This is carefully to be kept in view.

[* 717] * But we are now to look at what afterwards happened, and that leaves no doubt at all upon the transaction. Bostock took the deed away with him, and retained it in his possession until he handed it over to Mr. Kirby, when he applied to Mr. Kirby for the loan of £2000 upon the security of the leasehold property.

That Bostock was employed in this transaction by Mr. Kirby as his solicitor, and in his professional capacity, no one can affect to doubt. Mr. Kirby was in trade, and did not trust his own ignorance of law writings and inexperience in conveyancing.

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Bostock was acting therefore as his professional man; his agent to do, and his adviser to counsel. He then obtains the £2000 from Mr. Kirby on the assignment of the mortgage, and not a farthing of this does he pay over to his other client, Mrs. Kennedy, whose receipt he had obtained. He employs it in his own speculations, or to supply other of his necessities; and his practices being discovered, — his conduct brought before the Court of King's Bench, — his affairs plunged into confusion and bankruptcy, — he did not meet the charges, nor face his creditors, but absconded and went abroad.

This throws a broad and clear light upon all the story, which the inspection of the deed tells, making quite plain with what view and in what way the signature of Mrs. Kennedy was gotten, and showing as clearly that he made her sign the receipt without seeing what she was setting her hand to, by a statement that she was only completing her execution of the mortgage deed itself, or doing an act by which she would secure the regular payment of the interest upon her mortgage-money. To say that the deed only raises suspicion after this, is wholly impossible. The after acting clears *all doubt away, and we see [* 718] the whole transaction in its proper and its hideous colours.

How much worse than ordinary breaches of trust, committed under the pressure of embarrassment, this conduct of Bostock's was, need not be noted in passing. The man of business who diverts to his own use his client's money entrusted to his hands, and while his client employs him in some sort as a banker, is far from blameless, though that peculiar kind of employment, and the nature of that deposit, and the pressure of his unforeseen necessities may greatly extenuate his fault. But here was a person who actively contrived a fraud to delude both his employers; took advantage of one of those clients to obtain an instrument by getting a signature to one thing, whilst he made the party suppose she was signing another; imposed on his other client and relative by giving him for a large sum an instrument at law not worth a farthing, if the truth came out, and then applied the money so obtained to his own uses, — conduct approaching in a moral view, nearer than by any assignable distance, to forgery.

But the degree of Bostock's guilt or the complexion of his fraud — be it more aggravated, be it less — is immaterial to the decision of the present question. That there was fraud is abun-

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dantly clear: such fraud as, if proved to a Court and jury, would have rebutted all claims at law upon this instrument, and sustained the plea of *non est factum* by Mrs. Kennedy pleaded in bar. I have no kind of doubt that such would be the case, and this the result of an action or of an issue, which I therefore hold it superfluous to direct.

But has not Mrs. Kennedy also a right to the equitable [* 719] relief of this Court? That depends upon a defence * competent to Mr. Kirby here, though immaterial elsewhere. He says he was a purchaser for value, and without notice; and the question thus raised is, had he notice or not? Of actual knowledge there is no question. No evidence touches Mr. Kirby, nor is he charged in any way with knowing or partaking in the fraud of Bostock. But it is said that neither had he any constructive notice.

The doctrine of constructive notice depends upon two considerations; first, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge, that the law holds the knowledge to exist, because it is highly improbable it should not; and next, that policy, and the safety of the public, forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant and yet all the while let his agent know, and himself, perhaps, profit by that knowledge.

In such a case it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to both, whether it be so in fact or not. Under one or other of these heads, perhaps under both, comes the other principle, which is quite undeniable, that whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is also notice to everything to which it is afterwards found that such inquiry might have led, although all was unknown for want of the investigation.

These principles are so plain that they need not be supported by reference to authority, and they dispose of the present [* 720] question. * Bostock was acting as Mr. Kirby's solicitor in the transaction, and although, generally speaking, the knowledge obtained by a man's attorney or agent fixes himself, if

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obtained while so employed, and on the same business (for I do not at all differ from *Mountford v. Scott*, 3 Madd. 34 (18 R. R. 189); *Hiera v. Mill*, 13 Ves. 114 (9 R. R. 149), and the other cases), yet it cannot here be said that Mr. Kirby is fixed with all which Bostock knew. For the fraud, practised by Bostock upon Mr. Kirby himself, was of course concealed from him; and so we may say would certainly be that other fraud which he had practised on Mrs. Kennedy. Indeed that was only another part of the same fraud, another act of the same plot; and, therefore, I think we cannot, on this account alone, fix his client Mr. Kirby any more than his other employer Mrs. Kennedy, with the knowledge of his criminal proceedings. We must lay out of our view all the knowledge, the actual and full knowledge he had of his own fraud, and are not to hold Mr. Kirby as cognisant — I mean of course cognisant in law and constructively — of that, merely because his solicitor himself, the contriver, the actor, and the gainer of the transaction, knew it all well.

But suppose him not the actor, and only regard him as an attorney wholly unconcerned in the plot, and employed by Mr. Kirby, and not only innocent of the whole affair, but wholly ignorant of it. This supposition is as strong as we can make in Mr. Kirby's favour, gets rid of all the last argument I have adverted to, and meets the objection that the plotter of the fraud never could communicate it to one of its victims; and that to charge the latter with his guilty knowledge would be unjust. I say still, with all this deduction and all this supposition, Mr. Kirby is fixed. For Bostock, had he been wholly free from the guilty knowledge, and only *employed as a [*721] solicitor to act for and advise Mr. Kirby must, on seeing the deed, have had his attention at once called to the suspicious circumstances under which it was executed. The contents of the instrument itself were perhaps calculated to rouse suspicion, and prompt inquiry. But the back of the deed was checkered all over with suspicious appearances. The title of the deed, not in the engrossing hand, but written in a somewhat slovenly way, and with the words of the title of different sizes, beget a suspicion of hurry and imperfection in the preparation of the instrument. When does a stationer ever send such a blank indenture out of his office, unless when pressed for singular despatch? Then the receipt written across one fold into a second square sideways, and

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the signature in like manner running into the second square. But, above all, the receipt removed far from the top, and leaving such a space as might by the holder of the deed, supposing that space to have been left in blank, have been filled up in any manner he chose. This was, at once, the circumstance to excite the greatest, the most jealous suspicion. Had a check been originally written with an inch of blank to the left hand of the sum, would not all who saw it start at the risk run by the maker, and would not the maker, on his attention being drawn to it, nay, even the holder, take the precaution of drawing a line or two over the blank? But suppose a banker had discounted a check with a sum as "one hundred" interlined, would any Judge direct any jury to let that banker recover against the maker, though full value had by him the banker been paid for it? All the cases have decided the contrary, and held that every unusual circumstance is a ground of suspicion, and prescribes inquiry; and I hold the receipt written here in a way to enable any person to commit a gross fraud — a

way for that reason never adopted — was abundant ground [*722] for *suspicion, and demanded inquiry and explanation.

When to this we add the further unusual circumstance of the party's name being written on the square below, and with a fold between it and the receipt, so that it was most probably written when the receipt was folded down, assuredly no one can hesitate in pronouncing that whoever, especially a man of business, looked at the deed, must have conceived such suspicions as to call for inquiry; and if he had inquired, Mrs. Kennedy would have told him that she knew of no receipt, and had received no money, and that the whole, consequently, was a fraud. Thus, taking Bostock to be merely an ordinary solicitor, employed by Mr. Kirby in settling this transaction for him, the deed was such as at once gave him notice that all was not right, and put him upon inquiring. That is notice to him and his employer of whatever the inquiry would have disclosed. Can it make the least difference, that in this case Bostock abstained from making the inquiry, because he already knew the whole fraud, the tissue of which his own hands had woven? Can it alter the fact, or displace the point, on which the whole turns, of the existence of suspicious appearances, and the certainty that the inquiry, instigated by them, must have disclosed the truth, that this truth was already within the full knowledge of the person employed, and whom we

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are supposing to have examined the deed for his client? A difference it may make, but the difference is against, and not in favour, of the defendant's argument.

Can it, again, make any difference in the case we are supposing of a solicitor employed to examine a deed, and having ground to suspect, and, suspecting, being bound to inquire as to its fraudulent concoction, that here, besides being so employed, he was himself the fabricator of the whole fraud, and only did not suspect, * because he knew for certain the whole plot? [* 723] A difference it may make, but that difference is against, and not in favour, of the defendant's argument.

I therefore consider the case of constructive notice as here abundantly made out, and I affirm the decree of the MASTER OF THE ROLLS; but I think, as the plaintiff resorts to this Court for relief against her own handwriting, we must recollect that she, by simply looking at the parchment which she signed without seeing what it contained, might possibly have discomfited the wicked man who was engaged in circumventing her; and I do not, therefore, think she ought to have had her costs below against the other party, to whom no *laches* at all is imputable personally, who also is the defendant, and does not come to ask anything of the Court. The decree must therefore be affirmed with this alteration as to the costs, and, for the same reason, I do not give her the costs of the appeal. The deposit must be returned. . . .

ENGLISH NOTES

In all questions relating to notice through a solicitor or agent, regard must be had to sect. 3 and subsect. 2 of the Conveyancing Act of 1882.

Sect. 3 enacts a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless

(1) It is within his own knowledge, or would have come to his knowledge, if such inquiries and inspections had been made as ought reasonably to have been made by him, or (2) in the same transaction with respect to which a question of notice arises, it has come to the knowledge of his counsel as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such, if such inquiries or inspection had been made as ought reasonably to have been made by the solicitor or other agent.

(3) This section applies to purchase, made either before or after the commencement of the Act.

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On the nature of the notice taken by a client through his solicitor, and whether it can be rebutted by proof that the solicitor did not disclose it, there has been some difference of opinion, and in considering the cases applicable to land subject to a statutory register, it is important to notice that actual notice to the solicitor is actual and not constructive notice to the client.

In the ruling case of *Kennedy v. Green*, both the MASTER OF THE ROLLS in the Court below and the LORD CHANCELLOR treat the notice to the solicitor as actual notice to the client. In a later case which is often cited on another point, *Hewitt v. Loosemore* (1851), 9 Hare, 454, V.-C. TURNER seems to treat the implication of notice through the solicitor as capable of being rebutted.

In *Rolland v. Hart* (1871), L. R. 6 Ch. 678, 40 L. J. Ch. 701, 25 L. T. 191, 19 W. R. 962, the LORD CHANCELLOR said: "It has been held over and over again that notice to a solicitor of a transaction, and about which it is a part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that under such circumstances a man has not notice of that which his agent has actual notice of. The purchaser of an estate has in ordinary cases no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior encumbrance because he was not told of it by his solicitor."

In *Bradley v. Riches* (1878), 9 Ch. D. 189, see p. 196, 47 L. J. Ch. 811, 38 L. T. 810, 26 W. R. 910, a solicitor was mortgagor, and he had made a prior mortgage and acted also as solicitor for a mortgagee on a subsequent mortgage, and it was pressed upon the Court that if the prior mortgage had been disclosed, the subsequent mortgage would not have gone through, and the solicitor would have lost the benefit of that mortgage. FRY, J., held, on the authority of *Rolland v. Hart* (*supra*), that this was not sufficient to make evidence admissible to rebut the presumption of notice, through the solicitor.

The great difficulty in applying the doctrine of notice through the solicitor arises in case of fraud, and there are delicate shades of difference between the cases in which the client is held to be affected with notice and these in which he is not.

The ruling case of *Kennedy v. Green* is always referred to when the question arises, and it is often misunderstood. It is important, therefore, to see what were the actual facts on which the LORD CHANCELLOR grounded his judgment.

The question was whether the defendant, a subsequent mortgagee, was affected with notice of an assignment having been fraudulently obtained by the solicitor from the plaintiff of a prior mortgage without payment.

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It is to be observed (1) that the solicitor was the mortgagor to the defendant; (2) that he was held to have acted as solicitor for the defendant in his mortgage; (3) that the previous transaction of which notice was claimed to be imputed was in itself a fraud of the solicitor upon the plaintiff; (4) that the solicitor being himself the mortgagor was committing a fraud on the defendant in the mortgage to the defendant.

The LORD CHANCELLOR further held (5) that this fraud in the mortgage to the defendant was but a continuance of and part of the same plot as the original fraud on the plaintiff. So that the question did not arise, whether or not it was necessary that the notice be obtained in the same transaction.

It was argued that notice was to be imputed to the defendant, the subsequent mortgagee, on two grounds: (1) that the solicitor had notice of the fraud as he committed it, and, notwithstanding the fraud, it was to be imputed to the defendant his client; (2) that notice that the plaintiff's mortgage debt had not been paid was to be imputed, because the form of the indorsed receipt and indorsements on the deed were in such unusual form as would have put an innocent solicitor on inquiry.

The MASTER OF THE ROLLS decided that notice must be imputed on both grounds. The LORD CHANCELLOR held that notice could not be imputed on the first ground, because the fact that the matter was an actual fraud of the solicitor excluded the imputation of notice.

That it was to be imputed on the second ground, because that would have put an innocent solicitor on inquiry, and must be imputed though the solicitor was committing a fraud.

Later cases show that in order to apply the doctrine of *Kennedy v. Green*, so as to exclude notice through fraud of the solicitor, it is essential that the act or document of which notice is to be excluded was itself a fraud of the solicitor. In *Hewitt v. Loosemore* (1851), 9 Hare, 456, Vice-Chancellor TURNER said, "There was here no fraud in the original deposit with the plaintiff and no fraud in the mortgage to the defendant, if the fact of the deposit with the plaintiff was communicated and it would, I think, be a misapplication of the case of *Kennedy v. Green* to hold that the fact of the deposit must be taken not to have been communicated, because it was a fraud to conceal it."

In *Atterbury v. Wallis* (1856), 8 De G. M. & G. 454, both KNIGHT BRUCE, L. J., and TURNER, L. J., held that Wallis was affected with notice of an intermediate mortgage, through the knowledge of Lampray, who was both the solicitor and mortgagor. TURNER, L. J., distinguished the case from *Kennedy v. Green* as follows (see p. 466. in the report in 8 De G. M. & G. 466):—

"The case of *Kennedy v. Green* was much relied on upon the part

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of the defendant in the argument upon this part of the case, but I thought, in *Hewitt v. Loosemore*, and I continue to think, that that case does not govern cases like the present. In that case there was fraud independently of the question whether the act which had been done was made known or not. In such cases as the present the question of fraud wholly depends upon whether the act which has been done has been made known or not."

There was a case decided in 1859 by Lord CHELMSFORD of *Espin v. Pemberton*, 3 De G. & J. 547 (referred to in the judgment of FRY, J., in *Cave v. Cave*, *infra*), but it does not appear that the encumbrance as to which the question of notice in that case applied was in itself a fraud. The case turned particularly on the decision that although the mortgagor was the only solicitor who acted, he was not therefore solicitor for the mortgagee.

There was another case in the same year (1859); *Eastham v. Wilkinson*, 33 L. T. (O. S.) 234, where the only solicitor acting was not a mortgagor, but was a party to the fraud. WOOD, V.-C., held that in effect it could not be implied that the solicitor was solicitor for the mortgagee. He also held, on the authority of *Kennedy v. Green*, that if a solicitor, having been party to a fraud, wishes to get a client to invest money in the security, the client would not be held to have constructive notice, "because the solicitor himself, being concerned, would be the very person to keep secret the transaction in order to obtain his end, which would be a second fraud."

In *Re European Bank* (1870), L. R. 5 Ch. p. 358; P., manager of a bank, fraudulently purchased with moneys of the bank overdue bills of exchange, and subsequently, acting as director or agent for E. Company, sold to E. Company the overdue bills. It was held by GIFFARD, L. J., that though P. was agent for the E. Company, they were not affected with notice that he had purchased fraudulently with moneys of the bank, as the LORD JUSTICE said, "He cannot be taken to have disclosed his own fraud, and *Kennedy v. Green* therefore applies."

In *Rolland v. Hart* (1871), L. R. 6 Ch. 678, 40 L. J. Ch. 701, 25 L. T. 191, 19 W. R. 962, the facts were, a solicitor induced a client to advance money on lands in Middlesex, and soon after induced a second client to advance money on the same lands without informing him of the first mortgage. The solicitor afterwards left the country, and the holder of the second mortgage registered it before the first mortgage was registered; it was held that the holder of the second mortgage must be taken to have had notice through his solicitor of the first mortgage, and could not, by prior registration, obtain priority.

HATHERLEY, L. C., said, "It might be said that the very fact of the solicitor not having communicated an important circumstance is of it-

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self-evidence of fraud. But Lord Justice TURNER, in the case of *Atterbury v. Wallis* (*supra*), exactly meets that difficulty, and says that such a rule cannot prevail. It must be made out that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him.

The LORD CHANCELLOR refers with approval to the judgment of TURNER, L. J., in *Atterbury v. Wallis* (*supra*), which in effect laid down that notice of a former transaction would be imputed, unless such former transaction was in itself a fraud of the solicitor, even though concealment of it was a fraud; it must be presumed that the LORD CHANCELLOR did not intend to differ from this, but to add a further condition as requisite to exclude the imputation of notice: viz.; — that a fraud must be intended in the very transaction in which it is claimed that notice of the former transaction is to be imputed to the client, see the decisions *infra*.

In *Waldd v. Gray* (1875), L. R. 20 Eq. 238, C., who had mortgaged to trustees, obtained the title deeds fraudulently from W., one of them, a solicitor, and then suppressing the mortgage deeds deposited the other title deeds with a bank by way of equitable mortgage, the bank took a certificate that C. had a good title from W., the fraudulent trustee who acted as their solicitor. Vice-Chancellor STUART held that by reason of the fraud of W. notice of the first mortgage could not be imputed through him to the bank. The VICE-CHANCELLOR laid down (p. 251), “If the disclosure of that fact of which knowledge is sought to be forced upon the client would have imputed fraud to the solicitor, it is not to be presumed that the solicitor did make disclosure of that fact.”

In *Bradley v. Riches* (1878), 9 Ch. D. 189, the plaintiff had lent money to a solicitor on the security of a deposit of title deeds of land in Middlesex with a letter charging the land, the legal estate in which was outstanding. The solicitor afterwards made a mortgage of the land to the client, acting as his solicitor, and the mortgage was registered. FRY, J., held that the client must be presumed to have had notice of the plaintiff's charge which, therefore, though unregistered, retained priority.

In *Care v. Care* (1880), 15 Ch. D. 639, V., a trustee and solicitor, used trust funds in purchasing an estate which was conveyed to his brother, and afterwards acted as solicitor for his brother and for the legal mortgagee, in raising money on the estate by a legal mortgage and afterwards by equitable mortgages. In this case FRY, J., the same Judge that decided *Bradley v. Riches* (*supra*), held that the fraud of the solicitor ran through the whole transaction and prevented the imputation of notice to the legal mortgagee, and that the legal mortgagee had priority over the *cestui qui trust*. FRY, J., said (see p. 643 of the report in 15 Ch. D.), “The doctrine applicable to the question has been commonly

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called that of constructive notice. Lord CHELMSFORD in the case of *Espin v. Pemberton*, 3 De G. & J. 547, considered that to be an inaccurate description, and thought that the expression 'imputed notice' was the correct one. It is not very material to consider which of the two terms is the more accurate, because there is undoubtedly an exception to the construction or imputation of notice from the agent to the principal, that exception arising in the case of such conduct by the agent as raises a conclusive presumption that he would not communicate the fact in controversy. This exception has been put in two ways. In the very well-known case of *Holland v. Hart*, L. R. 6 Ch. 678, Lord HATHERLEY put it substantially in this way, that you must look at the circumstances of the case and inquire whether the Court can see that the solicitor intended a fraud which would require the suppression of the knowledge of the encumbrance from the person upon whom he was committing the fraud. In *Thompson v. Cartwright*, 33 Beav. 178, the late MASTER OF THE ROLLS put it rather differently, and it would appear that, in his view, you must inquire whether there are such circumstances in the case, independently of the fact under inquiry, as to raise an inevitable conclusion that the notice had not been communicated. In the one view, notice is not imputed because the circumstances are such as not to raise the conclusion of law, which does ordinarily arise from the mere existence of notice to the agent; in the other view, that of Lord CHELMSFORD and Lord HATHERLEY, the act done by the agent is such as cannot be said to be done by him in his character of agent, but is done by him in the character of a party to an independent fraud on his principal, and that is not to be imputed to the principal as an act done by his agent."

The latest decision on the subject is that of the Court of Appeal in *Dixon v. Wench*, now reported (1900) 1 Ch. 736, referred to *ante*, p. 726, on another point. In this case the owner of real estate mortgaged it in fee to his solicitor, who shortly afterward transferred the mortgage to a client, the title deeds and the mortgage deed on which the transfer was indorsed being handed over to the transferee. The transferee omitted to give notice of the transfer to the mortgagor, and he was ignorant of it. Afterwards the property was sold, and was conveyed as free from encumbrances by the mortgagor and the original mortgagee to the purchaser by a deed (prepared by the solicitor) which contained false recitals, the mortgage and the transfer of it being suppressed.

The purchase-money was received by the solicitor, who out of it retained the mortgage debt and interest, and paid over the balance to his client, the mortgagor. The purchaser had no notice of the mortgage. The mortgagor did not call for the title deeds or the mortgage deed when the mortgage was paid off, but left everything to his solicitor, the

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original mortgagee, and signed what he told him to sign. The solicitor paid the interest on the mortgage debt to the transferee until he absconded, when the fraud was discovered. The purchaser then claimed to hold the property free from the mortgage; the purchaser's counsel claimed that the fraud excluded the imputation of notice, citing *Kennedy v. Green, supra*, and *Care v. Care, supra*. It was held by the Court of Appeal that the mortgagor was affected by notice, on the ground that the evidence showed the mortgagor had placed himself entirely in the hands of his solicitor, and constituted him his general agent in the transaction, the knowledge of the solicitor must be imputed to him, and he must be treated as having had notice of the transfer of the mortgage, and consequently the payment of the mortgage debt to the solicitor was not effectual as against the transferee, and the mortgage must be treated as still subsisting in her favour, and the purchaser must hold the property subject to it, but with a right to be indemnified against it by the mortgagor.

While this has been going through the press, a case has been decided which may be material as to the word "void" in subsect. 2 of sect. 7 of the Land Transfer Act, 1897, and also on the question which is discussed, *ante*, pp. 725, 726, whether, as against a purchaser without notice, a deed of mortgage is void which has been executed by the owner by the fraud of his solicitor under total misunderstanding of its effect and ignorance that it was a mortgage; see *King v. Smith & Preeker*, before Mr Justice FARWELL, reported in the Times Newspaper of May 26, 1900. The Judge said: "A mortgage was prepared and executed by the plaintiff, without any knowledge of its contents, and the deed was produced to Smith containing a receipt for the consideration money in the body of it. The money was paid by cheque and kept by Eldred (the solicitor). Now it was argued that the deed was invalid because it was obtained by fraud. On that point he took the law as laid down by MELLISH, L. J., in *Hunter v. Walters*," L. R. 7 Ch., at p. 86. "Now I am of opinion that there is evidence that both Hunter and Darnell were induced by the fraud of Walters to execute that deed, but the mere circumstance that they were induced to execute it by fraud does not make it a void deed in point of law," (and at p. 88), "Where a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, then, in my opinion, a deed so executed, although it may be voidable upon the ground of fraud, is not a void deed."

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AMERICAN NOTES.

The rule that notice to a principal is implied from notice to his agent is abundantly supported by the American authorities. "When an agent acquires a knowledge of any matters or instruments affecting the title of any lands, about the purchase or mortgage of which he is employed, and this knowledge is such that it is his duty to communicate it to his principal, the law imputes this knowledge to the principal; or, in other words, notice to the principal of such matters or instruments is implied." Jones on Law of Real Property in Conveyancing, sect. 1532. See *Smith v. Ager*, 101 United States, 320; *Donald v. Beals*, 57 California, 399; *Clark v. Fuller*, 39 Connecticut, 238; *Walker v. Schreiber*, 47 Iowa, 529; *Willis v. Vaillette*, 4 Metcalfe (Ky.), 186; *Allen v. Poole*, 54 Mississippi, 323; *Meier v. Blume*, 80 Missouri, 179; *Coggsuwell v. Griffith*, 23 Nebraska, 334; *Hovey v. Blanchard*, 13 New Hampshire, 145; *Jackson v. Van Valkenburgh*, 8 Cowen (N. Y.), 260; *Cowan v. Withrow*, 111 North Carolina, 306; *Bigley v. Jones*, 114 Pennsylvania State, 510; *Myers v. Ross*, 3 Head (Tenn.), 59; Mechem on Agency, sects. 718-731; 2 Pomeroy, Equity Jurisprudence, 2nd ed. sects. 666-676.

Notice to the agent, to bind the principal, must be within the scope of the agent's employment. Thus, in *Hickman v. Green*, 123 Missouri, 165, it was held that where G. employed agents to effect an exchange of land with H., their knowledge of a defect in H.'s title did not charge G., as their agency was only special, and it was not within the scope of their employment to examine and pass upon H.'s title. So, in *Tucker v. Tilton*, 55 New Hampshire, 222, where a question arose as to whether an attaching creditor was chargeable with notice of a prior unrecorded mortgage, the Court held that the knowledge of the officer employed to make the attachment was to be imputed to the creditor, but that the knowledge of the attorney who made the writ, but had no agency in procuring the attachment, was not. See, further, *Mechanics' Bank v. Schaumburg*, 38 Missouri, 228; *Hayward v. National Insurance Co.*, 52 Missouri, 181; 14 American Reports, 400; *Weisser v. Denison*, 10 New York, 68; 61 American Decisions, 731; *Congar v. Chicago & N. W. R. Co.*, 24 Wisconsin, 157; 1 American Reports, 164.

When the same agent is employed by both parties in the same transaction, his knowledge is then the knowledge of both. *Loscy v. Simpson*, 11 New Jersey Eq. 246. See also *Astor v. Wells*, 4 Wheaton (U. S. Sup. Ct.), 466.

As is stated in the rule, the implication of notice cannot be rebutted by proof that the agent did not communicate his knowledge to his principal. *Watson v. Sulro*, 86 California, 500.

Whether the knowledge must have been acquired by the agent in the course of transacting his principal's business, in order to bind the latter, is a question upon which there is a conflict among the American cases. To the effect that it must have been so acquired, see *McCormick v. Wheeler*, 36 Illinois, 114; *Jones v. Bamford*, 21 Iowa, 217; *Rouch v. Karr*, 18 Kansas, 529; 26 American Reports, 788; *Willis v. Vaillette*, 4 Metcalfe (Ky.), 186; *Weisser v. Denison*, 10 New York, 68; 61 American Decisions, 731; *Houseman v. Girard Mutual Building & Loan Association*, 81 Pennsylvania State, 256;

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Kauffman v. Robey, 60 Texas, 308; 18 American Reports, 264; *Blumenthal v. Brainerd*, 38 Vermont, 402; 91 American Decisions, 349. In *Houseman v. Girard Mutual Building & Loan Association*, *supra*, SHARSWOOD, J., said: "It is urged, that by the employment of the owner as the agent for this purpose [to procure an examination of title], the defendants are affected with this knowledge of the existence of the mortgage, which was omitted in the certificate. This is a very familiar principle and well settled. But it is equally well settled that the principal is only to be affected by knowledge acquired in the course of the business in which the agent was employed. . . . It is a mistake to suppose that it depends upon the reason that no man can be supposed to always carry in his mind a recollection of former occurrences, and that if it be proved that he actually had it in his mind at the time, the rule is different. It may support the reasonableness of the rule to consider that the memory of men is fallible in the very best, and varies in different men. But the true reason of the limitation is a technical one, that it is only during the agency that the agent represents and stands in the shoes of his principal. Notice to him then is notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it ceased would be."

But the Federal Courts, and the Courts of many states, have adopted the modern English doctrine, that the notice need not have been acquired by the agent in the particular transaction, but may have been acquired by him in a prior transaction, provided it is present to his mind at the time when he is acting as such agent. *The Distilled Spirits*, 11 Wallace (U. S. Sup. Ct.), 356; *Fairfield Savings Bank v. Chase*, 72 Maine, 226; 39 American Reports, 319; *Lebanon Savings Bank v. Hollenbeck*, 29 Minnesota, 322; *Horey v. Blanchard*, 13 New Hampshire, 145; *Arrington v. Arrington*, 114 North Carolina, 151, 172; *Hart v. Farmers' & Mechanics' Bank*, 33 Vermont, 252; Jones on Law of Real Property in Conveyancing, sect. 1534.

In the leading case of *The Distilled Spirits*, *supra*, BRADLEY, J., delivering the opinion of the Court, said: "In England, the doctrine now seems to be established, that if the agent, at the time of effecting a purchase, has knowledge of any prior lien, trust, or fraud, affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquires the knowledge when he effects the purchase, no question can arise as to his having it at that time; if he acquired it previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend on the lapse of time and other circumstances. Knowledge communicated to the principal himself he is bound to recollect, but he is not bound by knowledge communicated to his agent, unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule as now understood. With the qualification that the agent is at liberty to communicate his knowledge to his principal, it appears to us to be a sound view of the subject. The general rule that a principal is bound by the knowledge of his agent is based on the principle of law, that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty."

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So, in *Fairfield Savings Bank v. Chase*, *supra*. PETERS, J., said: "We think, all things considered, the safer and better rule to be that the knowledge of an agent, obtained prior to his employment as agent, will be an implied or imputed notice to the principal, under certain limitations and conditions, which are these: The knowledge must be present to the mind of the agent when acting for the principal, so fully in his mind that it could not have been at the time forgotten by him; the knowledge or notice must be of a matter so material to the transaction as to make it the agent's duty to communicate the fact to his principal; and the agent must himself have no personal interest in the matter which would lead him to conceal his knowledge from his principal, but must be at liberty to communicate it."

The agent's knowledge, acquired in a prior transaction, will not bind the principal, unless there be clear proof that it was present in his mind at the time of the transaction in question. *Yerger v. Barz*, 56 Iowa, 77; *Constant v. University of Rochester*, 111 New York, 601; *Slattery v. Schwanncke*, 118 New York, 543.

Knowledge possessed by an agent so shortly before as necessarily to give rise to the inference that it remains fixed in his memory when the employment began, binds the principal. *Chouteau v. Allen*, 70 Missouri, 290.

The rule that the agent's knowledge need not have been acquired in the very transaction in question is believed by Mr. Mechem to be supported by the better reason, and by a clear preponderance of authority. He states the general rule as follows: "The law imputes to the principal, and charges him with all notice, or knowledge relating to the subject-matter of the agency which the agent acquires or obtains, while acting as such agent and within the scope of his authority, or which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it." Mechem on Agency, sect. 721.

Mr. Pomeroy conceives the true doctrine to be somewhat more limited. He says: "In order that a principal may thus be charged with constructive notice, not only must the person first receiving it be in fact an agent, and be actually engaged in the business of his representative employment, but the notice must be given to, or the information acquired by, the agent or attorney in the course of the *same transaction* which is sought to be affected by the constructive notice; that is, in the same transaction from which the principal's rights and liabilities arise, which, it is claimed, depend upon or are modified by the constructive notice imputed to him. . . .

"The foregoing requisite, general as it is in its application, is subject to an important and well settled limitation, equally depending upon motives of expediency. Where the transaction in question closely follows and is intimately connected with a prior transaction in which the agent was also engaged, and in which he acquired material information, or where it is clear from the evidence that the information obtained by the agent in a former transaction was so precise and definite that it is or must be present to his mind and memory while engaged in the second transaction, then the foregoing requisite becomes inapplicable: the notice given to, or information acquired by the agent in the former transaction operates as constructive notice to the principal

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in the second transaction, although that principal was a complete stranger to and wholly unconnected with the prior proceeding or business." Equity Jurisprudence, 2nd ed. sects. 671-672.

However the general rule may be stated, it is clearly established that there are certain exceptions to it. The second paragraph of the rule indicates the most common of these. "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating." DEVENS, J., in *Innerarity v. Merchants National Bank*, 139 Massachusetts, 332, 333, citing the principal case.

In *Dillaway v. Butler*, 135 Massachusetts, 479, A., to whom B. was indebted, advised C. to lend money to B. on the security of a chattel mortgage, and acted as C.'s agent in completing the transaction. With the money thus obtained, B. paid A. the debt which he owed him. Both A. and B. acted in fraud of the insolvent law, but C. had no knowledge of the fraud. The Court held that A.'s knowledge was not in law imputable to C. See also *Frankel v. Hudson*, 82 Alabama, 158; *Atlantic National Bank v. Harris*, 118 Massachusetts, 147; *Allen v. South Boston R. Co.*, 150 Massachusetts, 200; *Barnes v. Trenton Gas Co.*, 27 New Jersey Eq. 33; *National Life Ins. Co. v. Minch*, 53 New York, 144; *Henry v. Allen*, 151 New York, 1; *Knoblock v. Germania Savings Bank*, 50 South Carolina, 259.

This exception to the general rule of imputed notice applies only to cases where the agent is guilty of a fraud, for the carrying out of which it is necessary that he should conceal his knowledge from his principal. "The Courts have carefully confined the operation of this exception to the condition described where a presumption necessarily arises that the agent did not disclose the real facts to his principal, because he was committing such an independent fraud that concealment was essential to its perpetration; it has never been extended beyond these circumstances. It follows, therefore, that every fraud of an agent in the course of his employment, and in the very same transaction, does not fall within this exception; and most emphatically, it does not apply when the agent's fraud consists merely in his concealment of material facts within his own knowledge from his principal." Pomeroy, Equity Jurisprudence, 2nd ed. sect. 675.

A new reason for the exception is suggested by FIELD, J., in *Allen v. South Boston R. Co.*, *supra*. "The general rule is, that notice to an agent, while acting for his principal, of facts affecting the character of the transaction, is constructive notice to the principal. . . . There is an exception to this rule when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of

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imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it. On this view, such a fraud bears some analogy to a tort wilfully committed by a servant for his own purposes, and not as a means of performing the business entrusted to him by his master. Whatever the reason may be, the exception is well established."

Mr. Pomeroy doubts whether this exception as to fraud can apply to presidents, directors, and other such managing officers of a corporation, through whom alone the corporation *can* act. Equity Jurisprudence, 2nd ed. sect. 675, n. 1.

Another exception to the general rule is said to exist in those cases where it would be a betrayal of professional confidence for the agent to communicate his knowledge to his principal. "When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information." BRADLEY, J., in *The Distilled Spirits supra*. Mr. Mechem, in a note to sect. 722 of his book on Agency, has collected many cases bearing on this point. It may perhaps be questioned whether there is any real exception to the rule in cases of this sort. Mr. Jones is evidently inclined to the opinion that there is not. He says: "The distinction is made that a solicitor or attorney-at-law, employed as a professional adviser, is not an agent within the rule that knowledge on the part of the agent affects the principal. Of course if an attorney-at-law is employed to negotiate the sale of property, or to invest money in mortgages, in such employment he acts as an attorney in fact, and not merely in his professional character. If an attorney, however, is merely consulted as to the title of land his client is purchasing, and he is not employed to negotiate the purchase, and he conducts the examination in the usual way of examining the records and ascertaining whether there is a clear record title, and he does not disclose information outside of the record which he has obtained in some other transaction, his client is not bound by such undisclosed knowledge of his professional adviser. The failure of the legal adviser to disclose the information he has acquired in such other transaction may have been dictated by professional obligation to another for whom he was acting at the time; but whatever the reason may have been for not disclosing the information, his client is not affected with notice of it." *The Law of Real Property in Conveyancing*, sect. 1535, citing *Arrington v. Arrington*, 114 North Carolina, 151, as "the most important case on this point."

It has been said that notice of a prior unrecorded mortgage is not to be

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imputed to a mortgagee for the reason that his agent or attorney in the transaction knew of the mortgage, provided the latter honestly believed it had been satisfied. *Constant v. University of Rochester*, 111 New York, 604, *Stanley v. Chamberlin*, 39 New Jersey Law, 565, illustrates a possible further exception to the rule. There an agent rented premises to the defendant, knowing that he intended to use them for gaming purposes. The principal had no actual knowledge of such intended use. The Court held that the principal could disown the agent's contract, and recover, on a *quantum valebat*, for the use of the premises, on the ground that the law will not impute turpitude to a principal by charging him with constructive notice through his agent, for the benefit of one who sets up his own wrongful act in his defence.

As to effect of notice to an officer or stockholder of a corporation, see Jones on Law of Real Property in Conveyancing, sect. 1543; Meehem on Agency, sects. 729-731.

END OF VOL. XXI



NOTES

ON

ENGLISH RULING CASES

CASES IN 21 E. R. C.

21 E. R. C. 1, TOMS v. WILSON, 4 Best & S. 442, 10 Jur. N. S. 201, 32 L. J. Q. B. N. S. 382, 11 Week. Rep. 952, affirming the decision of the Court of Queen's Bench, reported in 32 L. J. Q. B. N. S. 33, 8 L. T. N. S. 799.

Construction of contract as to time for performance.

Cited in *Whiting v. Gray*, 27 Fla. 482, 11 L.R.A. 526, 8 So. 726, holding that a contract for delivery of lumber "commencing from the 10th of July or as soon thereafter as vessel can be ready" meant that the vessel must be ready within such time after July 10th as under the circumstances was reasonable.

—Reasonable time to meet demandable payment or duty.

Cited in *Wood Reaping & Mowing Mach. Co. v. Smith*, 50 Mich. 565, 45 Am. Rep. 57, 15 N. W. 906, holding that demand for fulfillment of warranty requires performance within reasonable time though the warranty stipulates immediately; *Whitman v. Parker*, 18 N. S. 155, holding that if conditions is to be performed on demand that means reasonable time must be given according to nature of thing to be done; *Lawrence v. Pringle*, 3 D. L. R. 634 (dissenting opinion), on necessity of payment upon acceptance of option, rather than within reasonable time; *Fitzgerald v. Mellersh* [1892] 1 Ch. 385, 61 L. J. Ch. N. S. 231, 66 L. T. N. S. 178, 40 Week. Rep. 251, on right to reasonable time to find the money payable on demand; *Moore v. Shelley*, L. R. 8 App. Cas. 285, 52 L. J. P. C. N. S. 35, 48 L. T. N. S. 918, holding that where agent made demand on wife of mortgagor during his absence, nonpayment while he inquired into the alleged agency did not constitute default.

Cited in *Benjamin*, Sales, 5th ed. 687, on construction of contract for delivery "immediately on demand" or "on notice"; *Benjamin*, Sales, 5th ed. 760, 761, on allowance of reasonable time to pay where price is payable only after demand.

Distinguished in *Meeker v. Johnson*, 5 Wash. 718, 32 Pac. 772, holding a contract for sale of hops, payment to be made upon delivery, may be rescinded upon failure of vendee to make payment at stipulated time though tendered as soon as money could be transported from bank; *Turner v. Francis*, 10 Manitoba L. Rep. 340, where demand was not required by the contract.

Reasonableness of time as question of fact.

Cited in *Henderson v. McFadden*, 50 C. C. A. 304, 112 Fed. 389, holding that a contract for the sale of cotton, being between merchants, and one in which

time is generally essential, the intention of the parties with reference to the time is a question of fact.

Demand as condition precedent.

Cited in *McLaughlin v. De Lauret*, 12 C. L. R. (Austr.) 1, holding that upon a sale of shares of stock for delivery in three months' time, payment of the price and delivery are concurrent rights, necessitating a demand as a basis for an action for damages for nondelivery: *Fawcett v. Liverpool, L. & Ins. Co.* 27 U. C. Q. B. 225, on right to demand as condition precedent, acts agreed to be done by opposite party.

Cited in 2 *Meechem, Sales*, 1226, on demand for payment as prerequisite to recovery of purchase price.

Measure of damages for trover by breach of contract.

Distinguished in *Johnson v. Lancashire & W. R. Co.* L. R. 3 C. P. Div. 499, 39 L. T. N. S. 448, 27 Week. Rep. 459, holding buyer and person from whom seller purchased were strangers notwithstanding agreement was effected to pay second seller direct; hence ordinary rule of damages applies as to strangers.

Implied contract of sale by judgment in trespass.

Cited in *Benjamin, Sales*, 5th ed. 85, on implied contract of sale by judgment in trespass.

21 E. R. C. 14, *WARWICKE v. NOAKES*, 1 Peake, N. P. Cas. 67, 3 Revised Rep. 653.

Sufficiency of payment by mail or the like.

Cited in *Williams v. Carpenter*, 36 Ala. 9, 76 Am. Dec. 316, holding that where a creditor authorizes a debtor to make payment by mail, upon getting postmaster's receipt and registering the letter, a failure to follow instructions through impossibility of compliance does not absolve the debtor in case of loss of letter; *Burr v. Sickles*, 17 Ark. 428, 65 Am. Dec. 437, holding that remittance by mail is at risk of sender unless there be express contract, or usage or course of dealing from which authority so to remit may be inferred; *Morton v. Morris*, 31 Ga. 378, holding that where a creditor requested debtor to remit with a request to send draft if possible, it was error to fail to charge that debtor must show that money was sent in letter at request of creditor or that such had been course of dealing between the parties; *Gurney v. Howe*, 9 Gray, 404, 69 Am. Dec. 299, holding that an offer by the debtor to send money by mail and an agreement by creditor to return note upon receipt of money is not sufficient to authorize a remittance by mail; *Currier v. Continental L. Ins. Co.* 53 N. H. 538, holding that premium money sent by the assured by express upon authority from the insurer was a sufficient payment, though the expressman embezzled the money.

Cited in *Benjamin, Sales*, 5th ed. 761, on payment being good if made in mode directed by seller.

Sufficiency of inter partes acts done through mails.

Cited in *Lothrop v. Greenleaf Stock & Mut. F. Ins. Co.* 2 Allen, 82, holding that a notice of assessment, sent by the insurer to the insured by mail according to the terms of the policy, is sufficient, though the notice does not reach the assured.

21 E. R. C. 17, *HART v. NASH*, 2 Crompt. M. & R. 337, 1 Gale, 171, 5 Tyrw. 955, 41 Revised Rep. 732.

Partial payments to toll limitations.

Cited in *Adams v. Tucker*, 6 Colo. App. 393, on partial payment tolling limitations.

Cited in Benjamin, Sales, 5th ed. 227, on what constitutes part payment for goods purchased within statute of frauds.

Payment in goods to toll of limitations.

Cited in *Engel v. Brown*, 69 N. H. 183, 45 Atl. 402, holding that a delivery and acceptance of wood at two and one half times its value and credited to debtor's account, to the knowledge of the debtor, is sufficient to imply a new promise; *Ball v. Parker*, 39 U. C. Q. B. 488, holding that the application of goods, bought by the creditor of the debtor, to the debt and assented to by the debtor's clerk, is not sufficient to create a new promise.

Payment of debt in goods or other than money.

Cited in *Me Leod v. New Brunswick R. Co.* 5 Can. S. C. 281, on sufficiency of draft as payment, accepted by creditor, but payment of which was refused at date of maturity; *Smith v. McEachren*, 7 N. S. 299, holding that payments in produce by debtor appropriated by creditor to a note are a discharge if so intended; *Roche v. Kempt*, 33 U. C. Q. B. 387, on intention as test of payment by credits.

21 E. R. C. 18, *WALKER v. NUSSEY*, 11 Jur. 23, 16 L. J. Exch. N. S. 120, 16 Mees. & W. 302.

Part payment under statute of frauds.

Cited in *Howe v. Hayward*, 108 Mass. 54, 11 Am. Rep. 306, holding that a deposit of money in the hands of a third person, as a forfeiture in case of breach of oral contract of sale, is not a part payment; *Norton v. Davison* [1899] 1 Q. B. 401, 68 L. J. Q. B. N. S. 265, 80 L. T. N. S. 139, 47 Week. Rep. 275, 13 Times L. R. 160, holding that in an oral contract for the sale of goods, an agreement that the vendor shall keep a sum of money over-paid on a previous order as part payment on the present one, is not valid, the mere oral agreement concerning the money not being a part payment.

Cited in *Hollingsworth*, Contr. 116, on part payment of contract within statute of frauds: 1 Mechem, Sales, 352, on agreement to satisfy previous indebtedness as part payment within statute of frauds; 1 Mechem, Sales, 353, as to when part payment under statute of frauds is to be made: 1 Beach, Contr. 673, on earnest and part payment within statute of frauds; 2 Page, Contr. 1072, on part payment taking contract out of statute of frauds.

—Agreement to accept goods in satisfaction or payment.

Cited with special approval in *Matthiessen & W. Ref. Co. v. McMahon*, 38 N. J. L. 536, holding that a contract for the sale of cooerage to be applied on a debt of the seller is not valid, no receipt for the debt having been given.

Cited in *Norwegian Plow Co. v. Hanthorn*, 71 Wis. 529, 37 N. W. 825, holding that where goods are sold or delivered to a creditor in part payment of a debt, and their value is credited on the account in good faith, there has been a sufficient payment for the goods as to take the sale out of the statute of frauds; *Sawyer v. Ware*, 36 Ala. 675, holding that an agreement and contract for delivery of iron and payment to be made by crediting debts of the seller is not a payment; *Groman v. Brossard*, 120 Mich. 611, 79 N. W. 903, holding that an oral agreement by a creditor to accept a quantity of stone lying where debtor had left them and apply them in extinguishment of the debt, no receipt being given or other act of acceptance manifested, does not constitute a delivery and acceptance or payment; *Gault v. Brown*, 48 N. H. 183, 2 Am. Rep. 210, holding that a contract for the sale of a quantity of wood on a certain lot, to be delivered that winter and following year and winter and to be paid for as delivered, is a contract for the sale of

the entire quantity of wood; and a payment for the wood delivered the first winter is a part payment: *Combs v. Bateman*, 10 Barb. 573, holding that where two men orally agreed to an exchange of horses for oxen and a note payable in oats, the consideration for the note was the undertaking to deliver the horses, and that not being in writing was defense to the note: *Milos v. Covacevich*, 40 Or. 239, 66 Pac. 914, holding that a mere oral agreement between a debtor and creditor, whereby the debtor agrees to deliver a net of the value of \$225 and the creditor agrees to accept it on the debt is not binding for lack of payment, where no receipt is given for the debt: *Dow v. Worthen*, 37 Vt. 108, holding that where a debt before unsettled is agreed upon at a sum and treated as a present payment on a contract of sale from the debtor to the creditor and in discharge of the indebtedness, the sale is binding: *Fuller v. Richmond*, 2 Grant, Ch. (U. C.) 24, holding that where a contract for the sale of saw logs was made, payment to be made by advances during progress of work and final payment upon delivery at mouth of river, and an oral contract made at same time or soon after that logs be marked with vendee's mark as security for advances, but delivery at mouth of river not to be effected, the oral contract is binding the advances being considered part payments: *McKenzie v. Robertson*, 2 N. S. 234, holding that a mere oral agreement that the debtor will deliver a net and the creditor will accept it as payment of the debt nothing further being done, is not a payment: *Davis v. Browne*, 9 U. C. Q. B. 193, holding that where a certificate for wheat was assigned to be credited on an indebtedness but in fact no credit was given, there was no payment under the statute of frauds, and the same would be true if it were proved that it was orally agreed that credit would be given: *Johnson v. Buchanan*, 29 N. S. 27, on extinguishment of debt as part payment on oral contract of sale.

Delivery and acceptance under statute of frauds.

Cited in *Bowers v. Anderson*, 49 Ga. 143, holding that an oral contract that seller shall haul the goods to a certain place and that when there they shall be at buyer's risk, and he to re-weigh and pay for as he uses them, does not constitute a transfer of title of the goods.

Cited in *Browne*, Stat. Frauds 5th ed. 433, on evidence necessary to establish acceptance and receipt of goods sold; *Browne*, Stat. Frauds 5th ed. 458, as to when acceptance and receipt of goods sold by verbal agreement may take place.

Earnest money as part payment.

Cited in *Davis v. Martin*, 146 N. C. 281, 59 S. E. 700, holding that a paper writing signed by vendors agreeing to convey certain lands to vendees in consideration of a sum "by way of earnest" is not an option but a contract to sell earnest meaning part payment.

Cited in 1 *Mechem*, Sales, 349, on earnest and part payment as synonymous terms.

Payment by application of debt or credit.

Cited in *Murray v. Moffat*, 19 N. B. 481, holding the application of a debt was payment if presently made by striking a balance.

Cited in *Benjamin*, Sales 5th ed. 226, on agreement to set off debt due to the buyer as part payment for goods purchased.

21 E. R. C. 26, *UNDERWOOD v. NICHOLLS*, 17 C. B. 239, 25 L. J. C. P. N. S. 79, 4 Week. Rep. 153.

Personal credit to agent on principal's debt.

Cited in *Hulburt v. Squires*, 1 West. L. Month. 443, Fed. Cas. No. 6,855, holding

that where one of three makers of note before it was due deposited with bank at which it was payable sum sufficient to pay note and took cashier's certificate of credit, note was not paid where no application to its payment was made when bank failed: *Neilly v. Bearns*, 40 N. S. 102, holding that where a bank as agent of the vendor accepted the vendee's check in payment and entered the amount to vendor's account but the vendee recalled the check and had it credited to his account, the vendee is not discharged: *Catterall v. Hindle*, 21 E. R. C. 28, L. R. 2 C. P. 368, holding that where a vendee made advances to the vendor's agent on the agent's general account and in payment of the vendor's bill offset the amount due him from the agent, he will not be discharged of the amount so set off.

Cited in note in 17 L.R.A.(N.S.) 607, on assumption of debt by agent as payment.

Liability of agent accepting worthless consideration.

Cited in *Paul v. Grimm*, 165 Pa. 139, 44 Am. St. Rep. 648, 30 Atl. 721, 35 W. N. C. 451, 25 Pittsb. L. J. N. S. 243, holding that agent who sells lands of principal and takes in payment worthless bonds of corporation is liable to principal for purchase price.

21 E. R. C. 28, *CATTERALL v. HINDLE*, L. R. 2 C. P. 368, reversing the decision of the Court of Common Pleas, reported in 12 Jur. N. S. 488, 35 L. J. C. P. N. S. 161, L. R. 1 C. P. 186, 14 L. T. N. S. 102, 14 Week. Rep. 371.

Payment to agent other than by cash.

Cited in *Hurley v. Watson*, 68 Mich. 531, 36 N. W. 726, holding that where one rents a house to the agent of a coal firm and applies the rent in payment of coal purchased through the agent unless the dealings are ratified he is not discharged from payment to the firm: *Paul v. Grimm*, 165 Pa. 139, 44 Am. St. Rep. 648, 35 W. N. C. 451, 30 Atl. 721, 25 Pittsb. L. J. N. S. 243, holding that an attorney in fact authorized to sell lands, make such terms as to him shall seem meet and collect all moneys due is not authorized to accept as payment anything other than money: *Jones v. Etna Ins. Co.* Fed. Cas. No. 7,453, holding that an insurance agent keeping a running account with his company may credit the company for premiums as against himself, the actual payment however having been the offset of a debt due a personal creditor.

Cited in note in 14 L.R.A. 234, on agent's power to use principal's property for payment of own debt.

Cited in Benjamin, Sales 5th ed. 792, on necessity that payment to agent be in money in usual course of business; 2 Mechem, Sales, 1249, on agent's right to receive nothing but money in payment.

New trial.

Cited in *Bunnell v. Greathead*, 49 Barb. 106, holding that where real question involved in action has not been presented, or determined, verdict will be set aside: *Coyle v. Brooklyn*, 53 Barb. 41 (dissenting opinion), on duty of court to set aside the verdict and order a new trial where there is an error through mistake or inadvertence.

—Error in taking case from jury.

Cited in *Reed v. Weldon*, 12 N. B. 460, holding that where by consent of counsel a verdict was taken, a new trial will not be granted on the ground that the question had not been left to the jury.

21 E. R. C. 39, VALPY v. OAKELEY, 16 Jur. 38, 20 L. J. Q. B. N. S. 380, 16 Q. B. 941.

Payment of debt by note or bill.

Cited in *Dille v. White*, 132 Iowa, 327, 10 L.R.A.(N.S.) 510, 109 N. W. 909, holding that it may be shown by evidence that intention of parties was that note given for debt was given and received in cancellation of debt: *Renald v. Walker*, 8 U. C. C. P. 37, holding that during the currency of a draft given for storage the warehousemen had no lien on the grain, though the firm giving the draft had become insolvent.

Cited in note in 10 L.R.A.(N.S.) 512, 519, on effect of transfer, without indorsement, of worthless check or note to third person.

— Revivor of debt on dishonor.

Cited with special approval in *Griffiths v. Perry*, 28 L. J. Q. B. N. S. 204, 1 El. & El. 680, 5 Jur. N. S. 1076, holding that in a sale and part delivery of a quantity of iron paid for by a draft, the lien of the vendors on the undelivered portion, revived when the draft was dishonored.

Cited in *Dows v. Swett*, 134 Mass. 140, 45 Am. Rep. 310, holding that where a note of a third person is given by a creditor, and which he guarantees, in extinguishment of his debt, if the note is not paid at maturity the debt is not extinguished.

Measure of damages for breach of contract.

Cited in 2 *Mechem, Sales*, 1374, on measure of damages for buyer's breach of contract where goods have not been delivered; 2 *Mechem, Sales*, 1405, on measure of damages for seller's breach of contract.

Measure of damages for refusal to accept and pay for goods sold.

Cited in *Acme Food Co. v. Older*, 64 W. Va. 255, 17 L.R.A.(N.S.) 807, 61 S. E. 235, holding that where the vendee rescinded his contract and refused to accept the goods, the measure of damages is the difference between the market value and contract price at the time and place of delivery: *Moore v. Logan*, 5 U. C. C. P. 294, holding that where vendor delivered 125 cords of wood, on a contract for sale of 500 cords to be paid for as delivered, and the vendee refused to pay for wood delivered or accept the balance, the measure of damages is the difference between market value and contract price at time and place of delivery.

— For failure to honor note or bill given in payment.

Cited in *Tufts v. Bennett*, 163 Mass. 398, 40 N. E. 172, holding that in an action for breach of contract of sale, payment to be made by honoring draft and giving notes, no draft being honored or notes given, the measure of damages is the difference between market value and contract price: *Moses v. Rasin*, 14 Fed. 772, holding that where vendees had given notes in payment which vendors had discounted to third parties, upon failure of vendors to deliver goods and vendees to pay notes, the measure of damages is difference between market value and contract price of goods at time and place of delivery.

Right to reclaim goods on insolvency of buyer.

Cited in *McElwee v. Metropolitan Lumber Co.* 16 C. C. A. 232, 37 U. S. App. 266, 69 Fed. 302, holding that in a contract for sale of lumber left in possession of the seller, where the buyer gave notes in payment but which notes were not honored at maturity but a renewal was requested, the lien reverted upon such renewal, the lien being a condition of the renewal; *Hamburger v. Rodman*, 9 Daly. 93, holding that upon sale of goods on credit, delivering of part of goods does not prevent lien of seller for price attaching to part remaining in possession,

upon buyer becoming insolvent; *Schaettle v. Benedict*, 1 Disney (Ohio) 445, holding that right of stoppage in transitu exists in favor of unpaid vendor, who has not waived his privilege, at any time before actual delivery, in case of insolvency of vendee existing; *Troop v. Hart*, 7 Can. S. C. 512, holding that a vendor who accepts a bill or note in payment of goods sold may, upon the insolvency of the vendee, keep possession of the goods until the bill or note is paid to himself or the holder of the paper; *Ex parte Chalmers*, L. R. 8 Ch. 289, 42 L. J. Bankr. N. S. 37, 28 L. T. N. S. 325, 21 Week. Rep. 349, holding that where a contract is made for the sale and monthly delivery of bleaching-powder and payment to be made for each delivery within certain days, upon the insolvency of the vendee the vendor may refuse to deliver more goods until paid for those already delivered and to be delivered.

Cited in 2 Mechem, Sales, 1283, on effect of taking note or giving receipted bill on revival of lien by buyer's insolvency; 2 Mechem, Sales, 1282, on revival of seller's lien on insolvency of buyer before compliance with delivery order.

— Chattel purchased through fraud.

Cited in *Hurd v. Bickford*, 85 Me. 217, 35 Am. St. Rep. 353, 27 Atl. 107, holding that where one fraudulently purchased a horse and subsequently sold it to a creditor in discharge of a debt, the original vendor may reclaim the horse on discovery of the fraud though the last purchaser was innocent.

Mutual right of parties on breach of contract.

Cited in *Bond v. Treahay*, 37 U. C. Q. B. 360, on liability of contractor as released by default of other party.

21 E. R. C. 48, *CAMIDGE v. ALLENBY*, 6 Barn. & C. 373, 9 Dowl. & R. 391, 5 L. J. K. B. N. S. 95, 30 Revised Rep. 358.

Bill or note as payment.

Cited in *Pope v. Tunstall*, 2 Ark. 209, holding that express agreement to take bill or note for amount of debt is absolute payment or extinguishment of debts and leaves creditor to remedy on instrument; *Wade v. Staunton*, 5 How. (Miss.) 631, holding that the taking of a bill of exchange with the agreement to collect and apply on a note is not a taking in payment of the note and does not discharge the debt; *Jaffrey v. Cornish*, 10 N. H. 505, holding that a negotiable promissory note given to a town in payment of taxes does not discharge them; *Barnet v. Smith*, 30 N. H. 256, 64 Am. Dec. 29, holding that a check given for a note and orally accepted by the bank is not payment for the note unless so agreed or cashed by the bank; *Bantz v. Basnett*, 12 W. Va. 772, holding that where debtor gives in payment of a note some cash, an obligation of a third party and a new note and secures a release of the note, such new note is a sufficient consideration for the discharge of the old debt; *Redpath v. Kolfage*, 16 U. C. Q. B. 433, holding that where a creditor at the time the goods were sold took a check as cash in payment, he thereby discharges the debtor; *Foster v. Swasey*, 2 Woodb. & M. 217, Fed. Cas. No. 4,984, on discharge of debt by note given at time debt was incurred; *McLeod v. New Brunswick R. Co.* 5 Can. S. C. 281 (dissenting opinion), on liability of a debtor who delivers a draft in payment of the debt.

Cited in 1 Beach, Contr. 455, on payment by bill or note; 2 Morse, Banks 4th ed. 792, on payment of checks in forged paper or counterfeit coin.

Distinguished in *March v. Thorburn*, New Foundl. Rep. (1884-96) 357, holding freighter not discharged under charter party where his agent gave a bill instead of cash which owner did not clearly take as payment.

—Effect of dishonor or insolvency of maker.

Cited in *Van Wart v. Hopkins*, 5 La. Ann. 266, holding that debtor paying by the bill of a third party was discharged upon the release by the creditor of the acceptor of the bill after dishonor; *Darnell v. Morehouse*, 36 How. Pr. 511, holding that in a sale for cash and a payment by a draft on a third person, does not discharge the buyer of his obligation to pay, where the draft is subsequently dishonored; *Bicknall v. Waterman*, 5 R. I. 43, holding that on sale in which the seller agreed to take certain notes in exchange the fact that the maker of one of the notes had failed at the time of the exchange is no defense, there being no fraud or warranty as to maker's solvency.

—Right of seller to return bill or note.

Cited in *Sebastian May Co. v. Codd*, 77 Md. 293, 26 Atl. 316, holding that where buyer of chattels gave a note on a firm which he knew at the time to be insolvent, the vendor is not obliged to keep the note in payment for the goods.

Distinguished in *Fisher v. Rieman*, 12 Md. 497, holding that where a bill and note broker in the regular course of business sells a bill for cash and not to extinguish a debt, and the bill is a forgery of which fact he is innocent, the buyer cannot recover of the seller the purchase money.

—Third person's note.

Cited in *Frisbie v. Larned*, 21 Wend. 450, on the satisfaction of a debt by a note of a third person.

Bank or circulating notes as payment.

Cited in *Corbit v. Bank of Smyrna*, 2 Har. (Del.) 235, 30 Am. Dec. 635, holding that if bank notes are passed in payment of antecedent debt, there is no implied agreement to take them as money; *Johnson v. Titus*, 2 Hill, 606, on sufficiency of payment in worthless or depreciated paper; *Scruggs v. Gass*, 8 Yerg. 175, 29 Am. Dec. 114; *Bayard v. Shunk*, 1 Watts. & S. 92, 37 Am. Dec. 441,—holding that where a debtor pays in bank notes which are received as cash, though they are valueless at the time by reason of previous failure of the bank, the debt is discharged; *Lichfield Union v. Greene*, 26 L. J. Exch. N. S. 140, 1 Hurlst. & N. 884, 3 Jur. N. S. 247, 5 Week. Rep. 370, holding that where guardians of the poor drew orders on the treasurer of the poor-law board and accepted at the time cash and bank notes on the treasurer's own bank, the sureties on the treasurer's bond will be discharged, the notes having been taken as money.

—As money.

Cited in *Klauber v. Biggerstaff*, 47 Wis. 551, 32 Am. Rep. 773, 3 N. W. 357, on banknotes as "currency;" *Latham v. United States*, 1 Ct. Cl. 149, holding that a contract for the erection of United States buildings and payment to be made in "good and lawful money of the coin of the United States" is lawfully discharged upon payment by the Treasurer of the United States in treasury notes, though they are then worth only forty-two cents on the dollar of the value of gold coin; *Re Cypress Election*, 8 Manitoba L. Rep. 581, holding that security for costs given in notes on chartered banks is not sufficient under a law that demands the security shall be in "current money of Canada."

—Right to return counterfeit.

Cited in *Thomas v. Todd*, 6 Hill, 340, holding that where a debtor innocently gave a counterfeit bill which was returned to him within a reasonable time by the creditor, the debtor is still liable to the amount of the counterfeit bill.

Liability of transferrer of worthless bill or note.

Cited in *Hewitt v. Waterman*, 3 La. Ann. 716, holding that where one for a

consideration transfers, without endorsement, a bill, knowing it to be of no value, the transferee being innocent, he will be obliged to repay the money received; *Foster v. Swasey*, 2 Woodb. & M. 217, Fed. Cas. No. 4,984, holding transfer without indorsement to be some evidence of sale without recourse.

Cited in note in 10 L.R.A.(N.S.) 528, on effect of transfer, without indorsement, of worthless check, or note of third person.

Necessity or excuse for failure to give notice of dishonor of bill or note.

Cited in *Moses v. Ela*, 43 N. H. 557, 82 Am. Dec. 175, holding that where an indorser of a note takes a mortgage on all the property of the maker to secure the note, the maker is still bound to pay the note and the indorser is entitled to notice of dishonor; *Sussex Bank v. Baldwin*, 17 N. J. L. 487, holding that a letter from the indorser of a note stating the maker was unable to pay and asking for an extension of time will not relieve the payee of the duty of giving the indorser notice of dishonor; *Shipman v. Cook*, 16 N. J. Eq. 251, holding that where a mortgagor indorses the note of a third person in payment on the bond, the neglect of the mortgagee to give notice of dishonor discharges the indorser; *Foote v. Brown*, 2 McLean, 369, Fed. Cas. No. 4,909, holding that where the guarantor of a note left with the payee certain drafts as collateral for their guaranty, and the payee failed to give notice of the dishonor of the drafts, it was such negligence as discharged the guarantor; *Conn v. Merchants' Bank*, 30 U. C. C. P. 380, holding that where one deposited with a bank, bank notes of an insolvent bank, of which fact he was innocent and the notes were placed to his credit, and later the bank charged them to his account instead of giving notice of dishonor, the bank was held liable; *Sparrow v. Boutin*, Newfoundl. Rep. (1854-64) 172, holding that where the buyer gave an order on a third person, which order was dishonored, the drawee having nothing, notice of dishonor was not necessary between the original parties to the order.

Diligence in presenting bill or note.

Cited in *First Nat. Bank v. Fourth Nat. Bank*, 24 Hun, 241, holding bank liable which received draft in discharge of an indebtedness sent it to another bank for collection which failed to present it on the day it was received and on the following day it was dishonored the drawee having failed that day; *Carroll v. Sweet*, 9 Misc. 382, 30 N. Y. Supp. 204, holding that indorser of check is discharged from liability where holder fails to present it for payment or protest; *Merritt v. Todd*, 23 N. Y. 28, 80 Am. Dec. 243 (dissenting opinion), on time to present or put into circulation a note or bill of exchange in order to charge the indorser of the note or drawer of the bill.

Cited in 2 Morse, Banks, 4th ed. 757, on necessity for presentment at some time before suit against drawer.

Diligence in returning valueless bank bills or notes.

Cited in *Wingate v. Neidlinger*, 50 Ind. 520, holding that where a vendor accepted a fifty dollar bill which was counterfeit, and failed to offer to return it from February to August he was negligent; *Frontier Bank v. Morse*, 22 Me. 88, 38 Am. Dec. 284, holding that where a bank for its convenience made an exchange of bills of small denomination for some of larger which were payable by a bank insolvent at the time and the bills were immediately forwarded, the loss must be borne by the person exchanging with the bank; *Atwood v. Cornwall*, 28 Mich. 336, 15 Am. Rep. 219, holding that taker of counterfeit money must use due diligence to ascertain its character and to notify giver, to entitle him to recover its value.

Laches and delay of holder as defense to bill or note.

Cited in *Sweet v. Southworth*, 125 Mass. 417, holding that where vendees paid for a bill of goods by a note of a third person indorsed by them, and the agent of the vendors lost the note and failed to notify the vendees for four months, the neglect of the agent made the note the vendors' and operated as a satisfaction of their demand.

Discharge of debt by delay in presentment and demand of bill or note given payment.

Cited in *Daniels v. Kyle*, 5 Ga. 245, holding that where indorsees of a check drawn upon a bank solvent at date of check and in which the drawers had sufficient money to cover check, failed to present check for two and one-half months thereafter and at which time bank became insolvent, they were negligent and the drawer's obligation was extinguished; *Simons v. Steele*, 36 N. H. 73, holding that failure of demand on absolute guarantor does not necessarily release him but may be shown in evidence as lack of diligence on part of holder of instrument; *Smith v. Miller*, 43 N. Y. 171, 3 Am. Rep. 690, holding that where a check was given in payment of a debt which would have been cashed on the day it was drawn, but on which payment was refused the day following, the delay of the payee was laches; *Betterton v. Roope*, 3 Lea, 215, 3 Am. Rep. 633, holding that where a debtor endorses a draft on a third person in payment, which is not presented at maturity by the creditor and shortly after the third party becomes insolvent, there was such neglect as discharged the debtor; *Torrey v. Baxter*, 13 Vt. 452, holding that where a firm gave their creditor the note of a third person, which they guaranteed, and after dissolution asked for a return of the note giving a new one on the firm which could not be enforced against the maker, unless the creditor is guilty of laches the firm is not thereby discharged.

Distinguished in *Leeds & C. Bank v. Walker*, L. R. 11 Q. B. Div. 84, 52 L. J. Q. B. N. S. 590, 47 J. P. 502, holding that where one gives a forged Bank of England note in payment of a debt it does not discharge the debt though the creditor was negligent in giving notice of its dishonor.

21 E. R. C. 60, *SKYRING v. GREENWOOD*, 4 Barn. & C. 281, 28 Revised Rep. 264, 6 Dowl. & R. 401, 1 Car. & P. 517.

Waiver of claim by inaction or silence.

Cited in *Fulton Ins. Co. v. Goodman*, 32 Ala. 108, holding that where the mortgagors of a sunken vessel make an offer to abandon, and the underwriters knowing of the mortgage make no objection, and later the mortgagees assent to the abandonment, while the vessel is at the disposal of the underwriters, they will not be allowed to object to the abandonment on the grounds of want of authority on part of mortgagor to make it; *Kenneth v. South Carolina R. Co.* 15 Rich. L. 284, 98 Am. Dec. 382, holding that no recovery can be had for excess of freight rates where payment was made after goods were carried and without objection.

— Claim for money overpaid.

Cited in *Greenland v. Weeks*, 49 N. H. 472, holding that where selectmen acting as town agents paid out for recruits more money than the town was authorized to expend and the town afterwards with knowledge assents to the acts of the selectmen, it cannot then recover from the selectmen the sums paid in excess of the town's authority; *Bend v. Hoyt*, 13 Pet. 263, 10 L. ed. 154, holding that where a merchant by mistake paid customs on goods which were

not subject to duty, and failed to bring suit for recovery of money so paid for over a year, he was guilty of negligence such as would release the collector.

Waiver of mistake.

Cited in *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798, holding that where one brought action to rescind a contract for sale of mining property on the ground of mistake of fact as to location and description of property but after knowledge of mistake continues for some time to treat the property as his own he will be held to have waived the objection and will be bound by the contract.

Payment or settlement under mistake of law.

Cited in *Bond v. Coats*, 16 Ind. 202, holding that one hiring a mule, which through no fault of his died, and who then promised to pay the owner the full value, will not be relieved of his promise because he was mistaken in his rights.

Distinguished in *Daniell v. Sinclair*, 18 E. R. C. 144, L. R. 6 App. Cas. 181, 50 L. J. P. C. N. S. 50, 44 L. T. N. S. 257, 29 Week. Rep. 569, holding that where compound interest has been paid through mistake of law as to legal interpretation of mortgage deed, the account may be reopened and the sum so overpaid returned.

— Official payments or settlements.

Cited in *Skinner v. Franklin County*, 3 Pa. Co. Ct. 424, on the right of a county officer to recover where through mistake of law he received less than entitled to, under an act afterwards declared unconstitutional; *Haldimand County v. Martin*, 19 U. C. Q. B. 178, on the right of a municipal corporation to recover of a public officer, fees paid in excess of statutory allowance.

Payment or settlements under mistake of fact.

Cited in *Ludlam's Estate*, 3 Clark (Pa.) 332, holding that executor is not estopped from denying claim of legatee where through mistake, he had promised to pay sum supposed by him to be due legatee; *Davis v. Newman*, 2 Rob. (Va.) 664, 40 Am. Dec. 764, holding that where an executor through a mistake of fact as to the extent of the assets of the testator overpaid the legatees he cannot subsequently recover back the sums so overpaid; *Gallego v. Atty-Gen.* 3 Leigh, 450, 24 Am. Dec. 650, on right of executor to recover from overpaid legatee; *Campbell v. Kitchen*, 12 C. L. R. (Austr.) 515, holding that a re-opening of accounts and a re-payment of moneys which have been voluntarily paid will not be decreed, although the money was paid under a mistake of fact; *Nightingale v. Bank of Montreal*, 26 U. C. C. P. 74, holding that where the payee of a note placed it in a bank for collection in which the maker had an account and on day of maturity the bank debited the maker's account and credited the payee's account also making entry of the amount in payee's pass book, but subsequently found that maker had overdrawn his account, they will be held to have paid the note and payee can collect amount of them.

Cited in notes in 11 Eng. Rul. Cas. 93, on estoppel by conduct; 15 Eng. Rul. Cas. 326, on right of tenant paying property tax to recover amount thereof from landlord after paying rent in full.

Cited in *Keener*, Quasi-Contr. 73, on effect of laches in asserting claim in money paid under mistake; 1 Morse, Banks, 4th ed. 542, on liability of bank in case of mistake in pass books.

Distinguished in *Ludlam's Estate*, 1 Pars. Sel. Eq. Cas. 116, holding that where an executor through mistake of fact overcharged himself to the benefit of a legatee, in an action by the legatee to secure payment of the sum the executor may in a court of equity show that the overcharge was in fact a mistake.

Payment of disputed claim.

Cited in *Misener v. Gaston*, Russell (N. S.) 125, holding that partner who pays over sum of money in dispute to copartner upon dissolution, cannot recover it back.

Who may not recover profits or damages.

Cited in *Paup v. Mingo*, 4 Leigh, 163, holding that negroes, recovering freedom by suit in forma pauperis, cannot recover profits or damages.

21 E. R. C. 68, *COCKS v. MASTERMAN*, 9 Barn. & C. 902, 8 L. J. K. B. N. S. 77, 4 Mann. & R. 676, 33 Revised Rep. 365.

Right of transferer to prompt notice of forgery of paper and claim of repayment.

Cited in *Rick v. Kelly*, 30 Pa. 527, holding that in a sale of notes on which were forged endorsements, the purchasers will be denied recovery of money paid, where they failed to give notice of forgery within reasonable time after discovery; *Rex v. Bank of Montreal*, 11 Ont. L. Rep. 595 (affirming 10 Ont. L. Rep. 117), holding that in case of mere forgeries there is no necessity of giving notice of dishonor in case payment was refused; *Ryan v. Bank of Montreal*, 14 Ont. App. Rep. 533, on liability of one to give notice of forgery of bill or draft; *Imperial Bank v. Bank of Hamilton*, 31 Can. S. C. 344, on negligence in making demand for repayment in case of forgery; *London & R. P. Bank v. Bank of Liverpool*, 21 E. R. C. 73, 65 L. J. Q. B. N. S. 80, 73 L. T. N. S. 473, [1896] 1 Q. B. 7, holding that where a bank as holder of a draft on which are forgeries, presents it for payment to the drawee and neither knowing of the forgeries it is paid, but a long time subsequent the drawee discovers the fraud and notifies the former holder, the drawee cannot recover the amount paid on the draft.

Recovery of erroneous payments on bills or notes.

Cited in *Hull v. Bank of South Carolina*, Dud. L. 259, holding that payee of check is not responsible to bank for amount of it paid to him without fraud on his part, although payment was made under mistake; *Clark v. Eekroyd*, 12 Ont. App. Rep. 425, holding that where merchants, having ordered three consignments of goods, one of which was lost in transportation, and in paying draft of consignor paid for all three, they were not bound to know that one was lost and might recover amount overpaid; *Nightingale v. Bank of Montreal*, 26 U. C. C. P. 74, holding that where payee of note placed it in a bank for collection in which the maker had an account, and on the day of maturity the bank debited the maker's account and credited the payee's account and on the following day made an entry of the amount in the payee's pass book, on subsequently learning that the maker's account has been overdrawn the bank cannot withhold payment of the sum so credited.

Cited in *Keener*, Quasi-Contr. 66, on legal title to money paid under mistake being in payee.

Distinguished in *Durrant v. Ecclesiastical Comrs.* L. R. 6 Q. B. Div. 234, 50 L. J. Q. B. N. S. 30, 44 L. T. N. S. 348, 29 Week. Rep. 443, 45 J. P. 270, holding that a tenant paying title rent-charge in excess of the amount due is under no duty to the owner of the titles to discover the mistake, and his failure is not a laches as will preclude him from recovering the amount so paid in excess.

Right of drawee to recovery of money paid on forged draft.

Cited in *United States v. National Exch. Bank*, 214 U. S. 302, 53 L. ed. 1006, 29 Sup. Ct. Rep. 665, 16 Ann. Cas. 1184, holding that United States can recover from bank presenting pension checks to and receiving money therefor from sub-

treasury, where names of payees have been forged; *Ellis v. Ohio Life Ins. & T. Co.* 4 Ohio St. 628, 64 Am. Dec. 610, holding that drawee of bill must know handwriting of drawer and must stand loss where he negligently accepts forged papers; *Bank of Hamilton v. Imperial Bank*, 27 Ont. App. Rep. 590 (affirming 31 Ont. Rep. 100), holding that bank which paid "marked" check that had been altered after "marking" to defendant bank, was entitled to recover back excess over original amount; *Bank of Montreal v. R.* 38 Can. S. C. 258 (affirming 11 Ont. L. Rep. 595, which affirmed 10 Ont. L. Rep. 117), holding that where a government clerk forged checks on the Bank of Montreal, the Government's banker, and deposited them in other banks to his credit, which checks were paid by the Bank of Montreal and debited against the Government, the Crown can collect the amount so debited by the bank.

Cited in note in 10 L.R.A.(N.S.) 64, on right of drawee to recover money paid on forged check or draft.

Distinguished in *Bank of Commerce v. Union Bank*, 3 N. Y. 230, holding that where the drawees of a draft, forged only in the body, were not negligent in discovery of forgery and gave notice of forgery as soon as discovered, they are entitled to recover back the money paid; *National Park Bank v. Ninth Nat. Bank*, 7 Abb. Pr. N. S. 120, 55 Barb. 87, holding drawee could recover amount over original amount, but not more, on a raised and forged bill which it had paid; *Imperial Bank v. Bank of Hamilton* [1903] A. C. 49, 87 L. T. N. S. 457, 51 Week. Rep. 289, 72 L. J. P. C. N. S. 1, 19 Times L. R. 56 (affirming 27 Ont. App. Rep. 590), holding where a certified check for \$5 fraudulently raised to \$500 is cashed by the bank on which it is drawn but the forgery is not discovered until the next day, the failure of the bank to give notice of forgery on day of presentation will not preclude them from right of recovery of the \$495 the check not having been dishonored; *Leeds & C. Bank v. Walker*, L. R. 11 Q. B. Div. 84, 52 L. J. Q. B. N. S. 590, 47 J. P. 502, holding that where a bank paid a Bank of England note, which was altered in number and date, and discovered the forgery some time subsequent, their failure to give notice to the prior holder on the day the note was presented, will not preclude them from recovering the amount so paid.

Disapproved in *Goddard v. Merchants' Bank*, 2 Sandf. 247, holding that where a third person pays a dishonored draft without seeing it and on the statement of the payee's agent that he has a genuine draft, for the honor of the drawer, and before the agent pays the sum to his principal, gives notice of the forgery of the draft, he may recover back the amount so paid; *Canal Bank v. Bank of Albany*, 1 Hill, 287, holding drawees not defeated from recovering where they paid holder's agent but failed to give notice till some time after discovery of forgery.

Estoppel of drawee to deny drawer's signature after payment.

Cited in *Ellis v. Ohio L. Ins. & T. Co.* 1 Handy (Ohio) 97, holding that where draft was paid by the drawee which was afterward discovered to be a forgery, he was estopped from denying the genuineness of the drawer's signature; *Scott v. Bank of New Brunswick*, 31 N. B. 21, holding that where person whose name was forged concealed forgery for number of years bank which paid deposit receipt was not liable to him thereon.

Right to prompt notice of dishonor of bill.

Cited in *Dominion Bank v. Union Bank*, 40 Can. S. C. 366 (dissenting opinion), on the right of a holder of a bill to be notified of its dishonor on the day it falls due.

21 E. R. C. 73, LONDON & R. P. BANK v. BANK OF LIVERPOOL, 65 L. J. Q. B. N. S. 80, 73 L. T. N. S. 473, [1896] 1 Q. B. 7.

Right to immediate notice of dishonor of check.

Cited in *Rex v. Bank of Montreal*, 10 Ont. L. Rep. 117, holding that rules as to notice established in regard to genuine bills and notes are inapplicable to case of mere forgeries.

Distinguished in *Imperial Bank v. Bank of Hamilton* [1903] A. C. 49, 72 L. J. P. C. N. S. 1, 87 L. T. N. S. 457, 51 Week. Rep. 289, 19 Times L. R. 56, holding where a certified check for \$5 fraudulently raised to \$500 is cashed by the bank on which it is drawn but the forgery not discovered until the next day, the failure of the bank to give notice of forgery on day of presentation will not preclude them from right of recovery of the \$495 the check not having been dishonored.

Endorsement as guarantee of validity of check.

Cited in *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 63 L.R.A. 245, 96 Am. St. Rep. 169, 73 Pac. 456, holding that bank which receives from customer check drawn by one bank upon another, amount of which has been raised, and endorses it "pay only through clearing house" is holder for collection and not liable as endorser; *Rex v. Bank of Montreal*, 11 Ont. L. Rep. 595, holding that third party banks could not be held to have warranted genuineness of forged checks merely by demanding payment of them without endorsing them; *Imperial Bank v. Bank of Hamilton*, 31 Can. S. C. 344 (affirming 27 Ont. App. 590, which affirmed 31 Ont. Rep. 100), holding that bank which paid "marked" check that had been raised after marking, to defendant bank, was entitled to recover back excess over original amount.

Disapproved in *Union Bank v. Dominion Bank*, 17 Manitoba L. Rep. 68, holding that where a bank endorsed a check which contained a forgery they will be held liable for the amount paid for the check, and estopped to deny that the check was what it purported to be or that they were the lawful holders.

21 E. R. C. 81, LECHMERE v. LECHMERE, Cas. t. Talb. 80, 3 P. Wms. 211, 2 Eq. Cas. Abr. 31, pl. 42; 2 Eq. Cas. Abr. 258, pl. 12; 2 Eq. Cas. Abr. 462, pl. 17; 2 Eq. Cas. Abr. 501, pl. 35.

What constitutes a gift.

Cited in note in 26 L.R.A. 308, on gift by promissory note.

Equitable enforcement of voluntary agreement or settlement.

Cited in *Horn v. Gartman*, 1 Fla. 73, holding that a gift to donee's son-in-law is not void for want of consideration; *Cumming v. Cumming*, 3 Ga. 460, on the rule that equity will enforce executed voluntary agreements but not such as are executory; *Burn v. Winthrop*, 1 Johns. Ch. 329, holding that equity will decree performance of a voluntary executed agreement enforcing the equitable interest though no consideration appears; *Duvoll v. Wilson*, 9 Barb. 487, on carrying out performance of a trust in favor of mere volunteer by courts of equity; *Learn v. Laufer*, 19 Pa. Dist. R. 526, holding that gift to child in shape of bond, is good against donor, even though he afterwards seeks to revoke it; *Dennison v. Goehring*, 7 Pa. 175, 47 Am. Dec. 505, holding that an executed voluntary trust in favor of children of trustor will be enforced against trustee; *Neves v. Scott*, Fed. Cas. No. 10,134, holding that equity will not enforce an executory agreement with respect to distribution of property of husband and wife, in favor of heirs of husband, they being volunteers.

—Against executor or administrator of promisor.

Cited in *Gordon v. Small*, 53 Md. 550, holding that a trust bond voluntarily given for benefit of another can be enforced against executor or administrator.

Enforcement of agreement in favor of beneficiary who was stranger thereto.

Cited in *Rodney v. Shankland*, 1 Del. Ch. 35, 12 Am. Dec. 70, holding that where first mortgagee pending litigation agreed with mortgagees subsequent to second mortgagee to pay second mortgage and remove his mortgage provided he be allowed to purchase certain land of mortgagor at sheriff sale, he became trustee for second mortgagee, and latter has remedy in equity; *Kimborough v. Davis*, 16 N. C. (1 Dev. Eq.) 71, enforcing an executory contract by husband before marriage and in consideration thereof to make provision for illegitimate son; *Smith v. Smith*, 36 Ga. 184, 91 Am. Dec. 761, granting specific performance of a voluntary agreement in favor of minor children against adult brother where agreement purports to be under seal.

Priorities in respect to voluntary deeds or bonds and other debts.

Cited in *Candor's Appeal*, 27 Pa. 119; *Isenhardt v. Brown*, 2 Edw. Ch. 341,—on rule that voluntary bonds without consideration are good against the executor being prior to legacies but subsequent to simple debts; *Bank of State v. Mitchell*, Rice, Eq. 389, on postponement of voluntary bond to rights of simple contract creditors; *Berg v. Radcliff*, 6 Johns. Ch. 302, on rule that a voluntary bond is good against an executor or administrator but must be paid subsequent to claims of creditors; *Stephens v. Harris*, 41 N. C. (6 Ired. Eq.) 57; *Hawkins v. Alston*, 39 N. C. (4 Ired. Eq.) 137,—holding that a voluntary conveyance is binding between the parties but cannot stand before other debts arising from contracts for value; *Carter v. King*, 11 Rich. L. 125, holding a sealed instrument in nature of a single bill may be postponed in the distribution of assets, to debts founded on valuable consideration on a showing of entire lack of consideration.

Enforcement of executory contract by volunteer.

Cited in *Neves v. Scott*, Fed. Cas. No. 10,134, holding that volunteer, or one who is not within influence of consideration of executory contract cannot maintain bill to enforce its performance.

Priority of contract debts of decedent.

Cited in *Morrow v. Morrow*, 2 Tenn. Ch. 549, holding that the right of a surety against principal will take precedence of debts incurred under principal's will.

Equitable performance of that which ought to be done.

Cited in *White v. Hart*, 1 Yeates, 221, holding that where husband before marriage covenants with intended wife that she may dispose of her lands by will, and she devises them during coverture, this shall operate as good appointment and her heir at law shall be bound without legal estate being vested in trustee; *Jackson ex dem. Rensselaer County v. Bull*, 1 Johns. Cas. 81, holding that contract for sale made under statute providing that conveyance shall be made immediately is prior to any conveyance made between time of contract and deed the deed relating back to time of contract; *Taylor v. James*, 4 Desauss. Eq. 1, holding it to be immaterial whether a paper was a conveyance of land or an agreement to convey, since, when for a valuable consideration, equity will look upon it as done.

Equitable conversion.

Cited in *Williams's Case*, 3 Bland. Ch. 186, as an illustration of an exercise
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of the ownership incident to conversion: *Smith v. McCrary*, 38 N. C. (3 Ired. Eq.) 204, holding that where the devisee of personalty and proceeds of sale of realty, to take after a life estate, dies, before life tenant such devise is a vested interest in personalty and goes to his personal representative.

Cited in note in 7 Eng. Rul. Cas. 20, on equitable conversion of realty into personalty, and vice versa.

Distinguished in *Nash v. Nash*, 2 N. C. (1 Hayw.) 228, holding doctrine of conversion inapplicable to fix status of legacy where there is no dispute between heirs and personal representative of deceased legatee.

— Direction to sell or change in specie.

Cited in *Turner v. Davis*, 41 Ark. 270, holding that in a joint conveyance of land in trust for sale conveyance and division no such legal interest remained in the cestui que trust as is subject to attachment for debts the land being equitably converted into money; *Samuel v. Samuel*, 4 B. Mon. 245, holding that where trustee holds land to be sold, having discretion as to time of sale, the land may be regarded as land until actually sold; *Hurt v. Fisher*, 1 Harr. & G. 88, on conversion of lands into personalty where they are devised to be sold or returned in money; *Holland v. Cruft*, 3 Gray, 162, holding that where real estate is specifically devised with authority in executor to sell and reinvest in personalty, the interest converted into personalty will remain subject to same disposition as of the realty in absence of contrary intent of testator; *New York L. Ins. & T. Co. v. Hoyt*, 31 App. Div. 84, 52 N. Y. Supp. 819, on equitable conversion to effectuate a neglected trust.

— Where trustee with power is also beneficiary by devolution.

Disapproved in *Pulteney v. Darlington*, 7 E. R. C. 45, 1 Bro. Ch. 223, holding that where trustee is entitled personally to money left by will to be laid out in land and makes a will not mentioning such money, giving his real and personal property to one devisee later making another will giving realty to one and personalty to another, the trust money passes as personalty.

Cited as overruled in *Re De Lancey*, L. R. 4 Exch. 345, holding conversion never took place where money held by trustee to invest in lands for himself devolved successively on a cotrustee as heir and then on another who renounced it as money.

Disability of trustee to injuriously affect rights under the trust.

Cited in *Cowling v. Douglass*, 4 Ala. 206, holding the trustees by delaying to do their duty under trust cannot effect or prejudice the rights of cestui que trust; *White v. Prentiss*, 3 T. B. Mon. 449, as proving that the rule that the action of trustee cannot prejudice right of beneficiary applies only to dealings between trustee and beneficiary or persons dealing with trustee in his trust capacity; *Ludlow v. Simond*, 2 Cal. Cas. 1, 2 Am. Dec. 291, holding consignee who as trustee was to sell and account worked discharge of a surety for his accounting by neglect to perform the principal agreement as made whereby liability was prolonged; *Williamson v. Buchanan*, 2 Overt. 278, holding surveyor who is public trustee cannot by neglect injure third person; *Pinson v. Ivey*, 1 Verg. 296, holding that the state of North Carolina became trustee with respect to state land held to be granted to soldiers for services and a grant of an unclaimed portion due to defendant to a university was inconsistent with states duty as trustee; *Morrill v. American Reserve Bond Co.* 151 Fed. 305, holding that state treasurer is trustee of securities placed by corporation to secure performance of contracts and a suit will lie in favor of creditors to compel treasurer

to turn them over to receiver of corporation for distribution as assets for benefit of such creditors.

— Adverse possession against trustee.

Cited in *Unangst v. Shortz*, 5 Whart. 506, holding that an action of trespass brought by trustee against members of society, the cestuis que trust, is proper and not to the prejudice of the cestuis que trust: *Adamson v. Adamson*, 28 Grant, Ch. (U. C.) 221, holding that failure of trustee to oust adverse claimant during life of life tenant cannot affect rights of remainderman against whom limitations run only from termination of life tenancy.

Satisfaction of trust or settlement.

Cited in *Arthur v. Arthur*, 10 Barb. 9, on the satisfaction by descent of a portion secured by settlement: *Goodfellow v. Robertson*, 18 Grant, Ch. (U. C.) 572, holding that where trust money was invested in land with money of trustee and trustee devised the land to wife and son of beneficiary such devise is not a satisfaction of the trust; *Sowden v. Sowden*, 21 E. R. C. 93, 1 Bro. Ch. 582, 1 Cox, Ch. Cas. 165, holding that where a person covenanted to pay money to trustees to be laid out in purchase of lands, a purchase by the covenantor personally and not through trustees was subject to trust.

— Performance pro tanto.

Cited in *Gilliam v. Chancellor*, 43 Miss. 437, 5 Am. Rep. 498, holding that if the thing done can be taken to be a part performance of obligation the presumption against satisfaction will be overcome in favor of a pro tanto performance.

Distinguished in *Weston v. Johnson*, 48 Ind. 1, where pro tanto rule was held inapplicable in case of devise of lands.

21 E. R. C. 93, *SOWDEN v. SOWDEN*, 1 Bro. Ch. 582, 1 Cox, Ch. Cas. 165.

Satisfaction of trust or settlement by equivalent act.

Cited in *Arthur v. Arthur*, 10 Barb. 9, on satisfaction of a trust to pay money to trustee to lay out in purchase of land, by a personal purchase of land having no connection with trustees.

Constructive or resulting trust.

Cited in *Goodfellow v. Robertson*, 18 Grant, Ch. (U. C.) 572, holding that money in the hands of one person belonging to another used in purchase of land may be traced to the land.

Cited in 1 Beach, Trusts, 326, on resulting trust from purchase by trustees.

Admissibility of parol evidence to establish a trust in lands.

Cited in *Powell v. Monson & B. Mfg. Co.* 3 Mason, 347, Fed. Cas. No. 11356, holding parol evidence admissible to show that purchase in name of one was a joint purchase, creating a trust for a moiety in favor of one whose name did not appear.

21 E. R. C. 100, *CADELL v. PALMER*, 10 Bing. 140, 7 Bligh, N. R. 202, 1 Clark & F. 372, 36 Revised Rep. 128, 3 Moore & S. 571, affirming the decision of the Court of Chancery, reported in 5 L. J. Ch. 113, 1 Sim. 173.

Perpetuities.

Cited in *Re Walkerly*, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772, holding the common law rule as to perpetuities applies to executory devises springing and shifting uses and trusts of both real and personal property and every gift by will or otherwise must be within the limits of the rule; *Brattle Square Church v. Grant*, 3 Gray, 142, 63 Am. Dec. 725, holding that because of the tendency of

executory devises to perpetuities, the rule has been established that any limitation by way of executory devise that may not take effect within a life in being or lives in being and twenty-one years or in case of a child en ventre sa mere, twenty-one years and nine months is void for remoteness: *Williams v. Williams*, 8 N. Y. 525, on the common law of England on perpetuities in land and the period allowable: *Morris v. Fisher*, 8 Pa. Dist. R. 161, as supplying the finishing touches to the judge made rule against perpetuities: *Ferguson v. Ferguson*, 2 Can. S. C. 497 (affirming a decision which reversed 39 U. C. Q. B. 232), on the settled rule that vesting must of necessity occur within the period of twenty-one years after lives in being: *Fonseca v. Jones*, 21 Manitoba L. Rep. 168, holding that possibility of power in deed of settlement being at some future time exercised so as to infringe rule against perpetuities does not make power itself void where it may be exercised in unobjectionable manner; *Meyers v. Hamilton Provident & Loan Co.* 19 Ont. Rep. 358, holding it too remote where sale might by terms of will take place three years after majority of child of the life on which estate was limited: *Re Ashforth* [1905] 1 Ch. 535, 74 L. J. Ch. N. S. 361, 53 Week. Rep. 328, 92 L. T. N. S. 534, 21 Times L. R. 329, on adaptation of the rule by courts to meet new limitations devised by conveyancers.

Cited in note in 10 Eng. Rul. Cas. 817, on the rule against perpetuities.

Cited in Freund, *Police P.* 372, on rule against perpetuities: 2 Washburn, *Real Prop.* 6th ed. 678, on scope of rule against perpetuities; Gray, *Perpet.* 2d ed. 172, on validity of successive gifts to persons unborn provided their estates vest within the required limit; 1 Washburn, *Real Prop.* 6th ed. 347, on validity of estate for years to commence in futuro; Underhill, *Am. Ed. Trusts*, 68, on legality of expressed object of trust.

— For period in gross.

Referred to as leading case in *Dungannon v. Smith*, 12 Clark & F. 546, 10 Jur. 721; *Cole v. Sewell*, 2 H. L. Cas. 186, 12 Jur. 927,—explaining the reason for allowing the twenty-one years in gross.

Cited in *Hayes v. Martz*, 173 Ind. 279, 89 N. E. 303, holding that at common law executory devise was required to vest in possession within life or lives in being, or within 21 years and nine months thereafter, reckoning from death of testator; *Middlesex Bkg. Co. v. Field*, 84 Miss. 646, 37 So. 139, on the extension of rule to twenty-one years in gross; *Re Smisson*, 79 N. J. Eq. 233, 82 Atl. 614; *Keeler v. Lauer*, 73 Kan. 388, 85 Pac. 541,—holding that provision in will that trust is to terminate and estate vest in beneficiaries within 21 years, or within common-law period does not offend rule against perpetuities; *Andrew v. New York, Bible & Prayerbook Soc.* 4 Sandf. 156, on English rule that twenty-one years in gross may be added to lives in being; *Becker v. Chester*, 115 Wis. 90, 91 N. W. 87; *Re Kopmeier*, 113 Wis. 233, 89 N. W. 134, —holding suspension of power of alienation for twenty-one years in gross was valid under statute allowing that period after lives in being; *Brown v. Brown*, 86 Tenn. 277, 6 S. W. 869, holding that limitation by way of executory devise is good if it must take place after life or lives in being and within 21 years and fraction of another year afterwards; *McArthur v. Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652, on the rule having relation to time and none to persons, but distinguishing the statute of Ohio which limits the right to suspend the vesting to person in being at making of will or the immediate issue of such person.

— Allowance of gestation period.

Referred to as leading case in *Cooper v. Heatherton*, 65 App. Div. 561, 73 N. Y. Supp. 14, holding that the words "youngest child" in a will includes a

child en ventre sa mere at time of death of testator so as to bring it into the meaning of the rule against perpetuities.

Cited in *Villar v. Gibley* [1907] A. C. 139, 1 B. R. C. 568, 76 L. J. Ch. N. S. 339, 96 L. T. N. S. 511, 23 Times L. R. 392, holding that there is no fixed rule of construction which compels court to hold that child was born in lifetime of testator because it was at that time en ventre sa mere; *Rolfe & R. Asylum v. Lefebvre*, 69 N. H. 238, 45 Atl. 1087, on the allowance of the additional period of nine months in the absence of any gestation; *Tollemache v. Coventry*, 2 Clark & F. 611, 8 Bligh, N. R. 547, on restriction to actual cases of gestation of the addition of months to the term in gross and distinguishing limitation over on a contingency which could never occur before twenty-three or twenty-four.

Cited in *Gray*, *Perpet.* 2d ed. 150-154, 185, 189, 190, on validity of suspension of alienation for life or lives in being and twenty-one years and the fraction allowed for gestation thereafter.

—Lives on which limitation may be based.

Cited in *Russ v. Russ*, 9 Fla. 105, holding that "heirs of their body" meant children and that a limitation over on failure of issue was not remote; *Madison v. Larmon*, 170 Ill. 65, 62 Am. St. Rep. 356, 48 N. E. 556, holding that an executory devise to take effect on the death of seventeen persons in esse, the children and grandchildren of testator, is not remote; *Towle v. Doe*, 97 Me. 427, 54 Atl. 1072, holding a trust by way of remainder for use of man and his children void for remoteness where it did not appear that only those children in esse at death of testator were intended to be included; *Lorillard v. Coster*, 5 Paige, 172, holding that an executory devise in trust to nephews and nieces, for their use until death of survivor of them is not void for remoteness where it applies to only those nephews and nieces, in esse at time of vesting of estate.

The decision of the Court of Chancery was cited in *Hill v. Hill*, 4 Barb. 419, holding that in a devise vesting property "on a failure of lawful issue," the quoted words imply an indefinite failure of issue when unexplained and as such avoid the devise.

—Time from which period is reckoned.

Cited in *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413, holding trust void because tied up for an excessive period reckoned from lives in being at death of testator.

Validity of trust for accumulation.

Cited in *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814, holding that where a devise covering an estate leased with a clause for removal for forty years on condition expressed, with provision that certain amount of rents be set aside each year to pay incumbrances such accumulation is not void for remoteness.

Remote executory devise void in whole or in part.

Cited in *St. Amour v. Rivard*, 2 Mich. 294, holding that an executory devise extending beyond the limits of the rule of perpetuities is void in toto and not merely as to the excess; *Edgerly v. Barker*, 66 N. H. 434, 28 L.R.A. 328, 31 Atl. 900, holding a suspension till certain grandchildren were forty years old was void as to the last nineteen years and the estate vested at the end of twenty-one.

Implied conditions against alienation or use of estate.

The decision of the Court of Chancery was cited in *Lampert v. Haydel*, 2 L.R.A. 113, 9 S. W. 780, on implied intention against anticipation.

Chancellor as only law lord in House of Lords in 1698.

Cited in Gray, *Perpet.* 2d ed. 145, on Chancellor as only law lord in House of Lords in 1698.

Correction of obvious mistake in will.

The decision of the Court of Chancery was cited in *Campbell v. Imperial Loan Co.* 18 Manitoba L. Rep. 144, holding that a court will correct an obvious mistake in a will.

Effect of specifying use of real estate in devise to religious society.

Cited in note in 11 L.R.A.(N.S.) 510, on effect of specifying use of real estate in devise to religious society.

21 E. R. C. 162. *COLONIAL BANK v. WHINNEY*, L. R. 11 App. Cas. 426, 56 L. J. Ch. N. S. 43, 55 L. T. N. S. 362, 34 Week. Rep. 705, reversing the decision of the Court of Appeal, reported in L. R. 30 Ch. Div. 261.

Choses in action.

The decision of the Court of Appeal was cited in *Mulcahy v. Collins*, 25 Ont. Rep. 241, holding that a residuary legacy is a chose in action, being the right to have administration on estate and is personal property in nature of separate estate of married woman to the extent that she might contract with respect thereto.

—Stocks and shares.

Cited in *Bradford Bkg. Co. v. Briggs*, L. R. 12 App. Cas. 29, 56 L. J. Ch. N. S. 364, 56 L. T. N. S. 62, 35 Week. Rep. 521, on the point that stock certificates in the hands of shareholders are evidences of title by which he is enabled to deal with his property interest, thereby evidenced as with other personal property.

—Arising ex delicto.

Cited in *McCormack v. Toronto R. W. Co.* 13 Ont. L. Rep. 656, 7 A. & E. Ann. Cas. 500, holding that a right to damages arising ex delicto is a chose in action though not assignable; *Dawson v. Great Northern & C. R. Co.* [1904] 1 K. B. 277, 73 L. J. K. B. 174, 68 J. P. 214, 90 L. T. N. S. 20, 20 Times L. R. 87, on the expressions of the Lord Justices approving the point that a right to damages for tort may be a legal chose in action, and the over ruling of the decision by the House of Lords, destroying the force of the expressions in the cited case.

Assignability of choses.

Cited in *Kirkpatrick v. McNamee*, 36 Can. S. C. 152, on assignments operative to transfer all substantial rights but not actionable rights.

Cited in notes in 67 L.R.A. 658, on validity of pledge or other transfer of stock when not made in books of corporation, as against attachments, executions, or subsequent transfers; 5 E. R. C. 180, on what constitutes an assignment of certificate of stock.

Gift causa mortis of a movable.

Cited in *Sinnot v. Hibernia Nat. Bank*, 105 La. 705, 30 So. 233, holding that there can be no legal manual gift causa mortis of a movable whether it be corporeal or incorporeal movable.

Assignee's right to sue in his own name.

Cited in *Laidlaw v. O'Connor*, 23 Ont. Rep. 696, holding that an assignment of a claim for negligence to plaintiff did not by virtue of statute give him right to sue thereon in his own name.

"Reputed ownership" of goods within bankruptcy act.

Cited in *Sharman v. Mason* [1899] 2 Q. B. 679, 69 L. J. Q. B. N. S. 3, 81 L. T. N. S. 485, 48 Week. Rep. 142, 16 Times L. R. 11, 7 Manson, 19, holding as to display stands left in possession of a tradesman for display purposes, it was a question of fact whether they were "in the possession" of him "in his trade or business" under such circumstances that he was "reputed owner thereof."

Cited in note in 4 E. R. C. 61, 62, on reputed ownership of bankrupt's property.

Title of trustees in insolvency.

Cited in *O'Deady v. McLoughlan*, Newfoundl. Rep. (1884-96) 457, holding that trustees in insolvency take no greater estate than that vested in insolvent.

Goods of "trader."

Criticized in *Ex parte Nottingham & N. Bank*, L. R. 15 Q. B. Div. 441, 54 L. J. Q. B. N. S. 601, 2 Morrell, 131, distinguishing between goods in possession "as a trader" and goods or debts "in the course of trade or business."

Decision of all points presented to court.

Cited in *Milnes v. Huddersfield*, L. R. 11 App. Cas. 511, 56 L. J. Q. B. N. S. 1, 55 L. T. N. S. 617, 34 Week. Rep. 761, 50 J. P. 676, on the desirability of deciding all of several points arising, any one of which is decisive of the action.

Presentation of stock certificate for registration of transfer.

Cited in *Rainford v. Keith* [1905] 1 Ch. 296, 74 L. J. Ch. N. S. 156, 92 L. T. N. S. 49, 21 Times L. R. 160, 12 Manson, 162, construing the note in a stock certificate requiring presentation of certificate for registration of transfer as not being a guarantee that registration would not be made without presentation of certificate but as notice that company could not be compelled to register transfer without presentation.

21 E. R. C. 185, *TOBIN v. REG.* 16 C. B. N. S. 310, 10 Jur. N. S. 1029, 33 L. J. C. P. N. S. 199, 10 L. T. N. S. 762, 12 Week. Rep. 838.

Liability of crown to suit based on consent.

Cited in *Briggs v. The Upper Cedar Point*, 11 Allen, 157, as a case casting doubt on the accuracy of the Year Books of Edw. III. and denying subject's right to sue the King; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240, on the inability to maintain suit against the King or Queen without his or her consent; *Canada C. R. Co. v. R.* 20 Grant, Ch. (U. C.) 273, holding that the court of chancery has jurisdiction to make a decree on a bill of right against the Province of Ontario asking for enforcement of claim by railway for public lands set aside for railways.

Cited in note in 8 E. R. C. 273, on right of Crown to name court in which proceedings against it shall be had.

Liability of government for acts of employees.

Cited in *Brown v. United States*, 6 Ct. Cl. 171, holding that action of claimants to recover of the government their own money unlawfully withheld by its officers is suit founded in justice and in right; *Quebec v. Reg.* 2 Can. Exch. 252, holding that under 50-51 Vict. chap. 16, Crown is liable in damages for death on public works resulting from negligence of officer or servant while acting within scope of employment; *R. v. McFarlane*, 7 Can. S. C. 216, holding that owner of lumber cannot by bill of right recover from Crown for damage caused by loss of lumber occasioned by negligence of slide master operating a slide

for the government: *Jones v. R.* 7 Can. S. C. 570, holding that the Crown cannot be held liable for misrepresentation of quantities in contract to be performed by suppliant, so made by Crown commissioner for construction of railway; *Windsor & A. R. Co. v. Queen & W. C. R. Co.* 10 Can. S. C. 335, on the rule that when officers of Crown assume to act in pursuance of a statute they are not to be regarded as acting in scope of their duties as agents of Crown, and an unlawful command of Crown is not in law a command, the Crown not being able to do wrong.

Personal liability of agents of government.

Cited in *Baker v. Ranney*, 12 Grant, Ch. (U. C.) 228, holding that keeper of slides, an agent of Crown, is liable for seizure of logs on false pretense that tolls had not been paid; *Evans v. Ross*, 10 N. S. 165, on the rule that since the King can do no wrong his agents are absolved from liability for their act when authorized by him; *Boyd v. Smith*, 4 Can. Exch. 116, holding that master of slides, an officer of the Crown, is personally liable for a wrongful seizure of lumber for collection of tolls supposedly due.

Cited in note in 1 E. R. C. 816, 817, on right of action against public officers.

Distinguished in *Nireaha Tamaki v. Baker* [1901] A. C. 561, 70 L. J. P. C. N. S. 66, 84 L. T. N. S. 633, 17 Times L. R. 496, holding that a land official of the Crown can be enjoined from seizure and sale of native land under statute when such seizure of land not covered by such statute and the fact that he is acting for Crown does not justify his acts.

Rights for which petition of right is open.

Cited in *Poirier v. Rex*, 1 D. L. R. 766, holding that petition of right did not lie for goods sold by officers where such goods were sent for inspection and were rejected and owner failed to remove goods; *Isbester v. R.* 7 Can. S. C. 696, on the rule that petition of right will not lie against Queen for a wrong but distinguishing such cases from bill based on contract; *Milner v. Luttrell*, 18 N. B. 87, on the cases in which the petition of right will lie, such as restitution for property taken by Crown and for claims arising on contract; *Muskoka Mill Co. v. Queen*, 28 Grant, Ch. (U. C.) 563, holding that petition of right will not lie for alleged wrongful act of public officers of department of Ontario, under 35 Vict. chap. 12.

— Based on contract.

Cited in *Berlinquet v. R.* 13 Can. S. C. 26, on petition of right being open to rights based on contract; *Thomas v. R.* 21 E. R. C. 202, 44 L. J. Q. B. N. S. 9, L. R. 10 Q. B. 31, 31 L. T. N. S. 439, 23 Week. Rep. 176, holding that where Crown agents agreed to pay award to inventor on performance of conditions precedent, the inventor performing such conditions, a petition of right will lie for breach of agreement; *Windsor & A. R. Co. v. R.* 21 E. R. C. 214, L. R. 11 App. Cas. 607, 51 J. P. 260, 55 L. J. P. C. N. S. 41, 55 L. T. N. S. 271 (extending, modifying and affirming 10 Can. S. C. 335), holding Crown liable by petition of right for breach of contract of leasing certain branch of railroad, and later taking it from lessee.

— For torts.

Cited in *Halifax City R. Co. v. R.* 2 Can. Exch. 433, holding that a claim founded in tort against the government for appropriation of tracks is not a subject for relief by bill of rights; *Hall v. R.* 7 B. C. 89, holding that a petition of right cannot be based on a refusal to sell government lands, such refusal, based on grant to a railway, alleged to have been illegal; *Milner v.*

Brydges, 18 N. B. 113, holding that petition of right cannot be maintained to recover unliquidated damages for trespass; *Quebec v. R.* 24 Can. S. C. 420 (dismissing appeal from 2 Can. Exch. 252), on the rule that a petition of right will not lie as a remedy for a tortious act.

21 E. R. C. 202, *THOMAS v. REG.* 44 L. J. Q. B. N. S. 9, L. R. 10 Q. B. 31, 31 L. T. N. S. 439, 23 Week. Rep. 176.

Claims enforceable by petition of right.

Cited in *Muskoka Mill Co. v. R.* 28 Grant, Ch. (U. C.) 563, holding that the words "and otherwise" in connection with "a payment of money or damages" do not create any new rights with respect to operation of petition of right, but merely go to the procedure.

Cited in note in 1 E. R. C. 815, on right of action against public officers.

— Unliquidated damages on contract.

Cited in *Skelton v. New Foundland*, New Foundl. Rep. (1884-96) 243, on the consideration given to the rule that petition of right will lie for breach of contract resulting in unliquidated damages by the cited case; *Noble v. New Foundland*, New Foundl. Rep. (1897-1903) 601, on the rule that petition of right will lie for damages resulting from breach of contract; *Isbester v. R.* 7 Can. S. C. 696, holding that contractor could recover from crown for a delay, being a breach of contract, in delivering material for construction of building under contract; *R. v. McLeod*, 8 Can. S. C. 1, on recovery of damages from breach of contract; *Windsor & A. R. Co. v. R.* 21 E. R. C. 214, L. R. 11 App. Cas. 607, 51 J. P. 260, 55 L. J. P. C. N. S. 41, 55 L. T. N. S. 271 (modifying and affirming 10 Can. S. C. 335), holding Crown liable for damages for breach of lease of branch of railway to suppliants for stipulated term, the measure of damages being the amount of loss caused by breach; *Evans v. Ross*, 10 N. S. 165, as extending the operation of the petition of right beyond the common law in cases of contract.

— Claims based on tort.

Cited in *Halifax City R. Co. v. Reg.* 2 Can. Exch. 433, holding that no action lies against Crown for claim founded in tort, and only remedy was by reference to official arbitrators; *Windsor & A. R. Co. v. Reg.* 10 Can. S. C. 335, holding that taking possession of railroad by officer of Crown, under assumed authority of act of Parliament, was tortious act for which petition of right would not lie; *Jones v. R.* 7 Can. S. C. 570, holding that the Crown cannot be held liable for fraud of its agents in procuring a contract.

— Form and sufficiency of petition of right.

Cited in *Peck v. R.* 1 B. C. pt. 2, p. 11, holding that in a claim for land under a Crown grant a failure to describe the land desired or in some way indicate location and amount is fatal to the claim.

Right of Crown to name court in which proceedings against it may be had.

Cited in note in 8 E. R. C. 273, on right of Crown to name court in which proceedings against it shall be had.

Authority of agent of Crown.

Cited in *R. v. Henderson*, 28 Can. S. C. 425, on the question of authority of contractor to bind the Crown and whether such contract was within the scope of that authority.

Extent of power of department officials to bind Crown.

Cited in *Wood v. R.* 7 Can. S. C. 631, holding that the Department of Public Works of the Dominion can bind the Crown by contracts for work under the department there being no legislation to the contrary and if there has been an appropriation for work done, an executory contract not conforming to statutes as to formal requisites may be enforced by bill of right to extent of recovery for value of work done thereunder.

Presumption that the king can do no wrong.

Cited in *Canadian P. R. Co. v. Cornwallis*, 7 Manitoba L. Rep. 1, on the fiction of the law that to know of any injury and to redress it is inseparable in the Crown.

21 E. R. C. 214, *WINDSOR & A. R. CO. v. REG.* L. R. 11 App. Cas. 607, 51 J. P. 260, 55 L. J. P. C. N. S. 41, 55 L. T. N. S. 271.

Recovery of damages as compensation for breach of public contract.

Cited in *Bulmer v. R.* 3 Can. Exch. 184, holding that where government of Canada entered into contract giving timber rights to land subsequently taken from it, the plaintiff can only recover rents paid, and not for expense incurred in survey, for breach of contract caused by loss of right of Canadian government.

When petition of right lies.

Cited in *Poirier v. Rex*, 1 D. L. R. 766, holding that only cases in which petition of right may be brought for money demand, are when property has found its way into possession of Crown.

Cited in notes in 1 E. R. C. 815, 817, on right of action against public officers: 8 E. R. C. 274, on right of Crown to name court in which proceedings against it shall be had.

—Petition of right based on a tort.

Cited in *McLean v. Rex*, 38 Can. S. C. 542 (dissenting opinion), on petition of right as not lying because of tortious act of official of Crown; *Poirier v. Rex*, 13 Can. Exch. 321, holding that petition of right does not lie to recover for tortious act of employees in service of Crown; *Hall v. R.* 7 B. C. 89, holding that a petition of right based on a tortious act of Crown or its authorized servant states no grounds of complaint.

Liability of Crown for acts of servants done within scope of authority.

Cited in *McLean v. R.* Can. Rep. [1908] A. C. 232 (dismissing appeal from 38 Can. S. C. 542), on the action of Crown servant in carrying out instructions issued in belief that they were within legal right; *R. v. Filion*, 24 Can. S. C. 482, holding that the Crown is liable for death caused by negligence of its servants acting within scope of employment by virtue of statute without respect to decisions prior to such statute.

—For breach of contract.

Cited in *Skelton v. Newfoundland*, New Foundl. Rep. (1884-96) 243, on recovery of damages for breach of valid contract by the Crown; *R. v. Mowat*, 1 Terr. L. R. 146, holding that where servants of Crown failed to weigh hay instead of measure it as per contract, they were guilty of such a breach of contract as to discharge surety for breach of contract to supply hay to government.

Distinguished in *Brigham v. R.* 6 Can. Exch. 414, holding that grantee of ferry rights has no action for breach of grant where government grants bridge and approach rights to railway companies diverting traffic from the ferry.

21 E. R. C. 222, *THE MARIA*, 1 W. Rob. 95.

Liability of ship owner for pilot's default.

Cited in *Smith v. Condry*, 1 How. 28, 11 L. ed. 35, holding that under English statutes master as owner of vessel trading to or from port of Liverpool, is not answerable for damages occasioned by fault of pilot; *O'Brien v. Cunard S. S. Co.* 154 Mass. 272, 13 L.R.A. 329, 28 N. E. 266, on liability of owners for negligence of pilot in navigating ship.

Cited in 1 Thompson, Neg. 585, on nonliability of employer for acts of licensed carriers, drovers, warehousemen, watermen, etc.

— Where taking of pilot is compulsory.

Cited in *Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique*, 63 Fed. 845, holding that ship owner is not liable at common law for damage caused by negligence of pilot compulsorily employed; *Smith v. The Creole*, 4 Am. L. J. N. S. 558, Fed. Cas. No. 13,032, holding that wrongful act of pilot is not imputable to owners or master of vessel, where he was in charge under compulsory law; *Homer Ramsdell Transp. Co. v. Le Campagnia Generale Transatlantique*, 182 U. S. 406, 45 L. ed. 1155, 21 Sup. Ct. Rep. 831 (affirming 63 Fed. 845), holding that in action at common law shipowner is not liable for injuries inflicted exclusively by negligence of pilot; *Smith v. The Creole*, 9 Phila. Leg. Int. 74, Fed. Cas. No. 13,032, holding vessel not liable for collision caused by pilot; *Guiterman v. Liverpool, N. Y. & P. Mail S. S. Co.* 9 Daly, 119, holding that presence of pilot on board, even by compulsion, prima facie exonerate owners from liability of act of negligence in management of vessel; *The Lotus*, 11 Lower Can. Rep. (Dec. Des. Tribunaux) 342, 2 Stuarts Adm. Rep. (Quebec) 58, holding owners of ship not liable for damage due to fault of pilot who was taken on board under compulsion of law; *Lampson v. Smith*, 8 Lower Can. Rep. (Dec. Des. Tribunaux) 193, holding master of ship not personally liable for injury done by his ship to property while sailing out of harbor under management of branch pilot taken on board under statute imposing penalty equal to amount of pilotage should pilot not be taken; *The Lion*, L. R. 2 P. C. 525, 6 Moore, P. C. G. N. S. 163, 38 L. J. Prob. N. S. 51, 21 L. T. N. S. 41, 17 Week. Rep. 993, on principle exempting owners of ship from liability for injury caused by pilot where taking of pilot is compulsory.

Cited in note in 37 L.R.A. 41, on which of two or more persons is master of another conceded to be servant of one.

Cited in 1 Thompson, Neg. 540, on pilot as employee of ship owner or master where pilotage is compulsory.

Disapproved in *The China*, 7 Wall. 53, 19 L. ed. 67, holding vessel liable for damages done in collision due to negligence of pilot taken under compulsion.

— Where taking of pilot is voluntary.

Cited in *Guiterman v. Liverpool, N. Y. & P. S. S. Co.* 83 N. Y. 358 (reversing 9 Daly, 119), holding owner of vessel not released from liability for negligent management of ship where taking of pilot is not compulsory.

Distinguished in *The Carolus*, 2 Curt. C. C. 69, Fed. Cas. No. 2,424, holding vessel liable for collision attributable to mismanagement of pilot employed by owner of ship where owner was not compelled by law to take pilot.

— Costs.

Cited in *The Lotus*, 11 Lower Can. Rep. 342, 2 Stuart, Adm. Rep. (Quebec), 58, holding dismissing, without costs, suit against owners for damage proceeding from fault of pilot alone.

What constitutes compulsory pilotage.

Cited in *The China*, 7 Wall. 53, 19 L. ed. 67, holding taking of pilot is compulsory under statute imposing penalty of fine for failure to do so.

Distinguished in *Smith v. The Creole*, 2 Wall, Jr. 485, Fed. Cas. No. 13,033, holding taking of pilot not compulsory under statute requiring payment of half pilotage fees, in case services of pilot are declined.

Disapproved in note to *The Lord John Russell*, 1 Stuart, Adm. Rep. (Quebec) 190, holding that pilotage is not obligatory where master has option of refusing pilot upon payment of half fee.

— When obligation arises.

Cited in *Guiterman v. Liverpool, N. Y. & P. S. S. Co.* 83 N. Y. 358 (reversing 9 Daly 119), holding that where vessel is not ready for sailing there is no obligation to employ pilot.

Condition of pilot as affecting liability.

Cited in *Earnmoor S. S. Co. v. Union Ins. Co.* 44 Fed. 374, holding charge not sustained where there was no direct evidence regarding pilot's condition, beyond fact he had been drinking.

Liability of owner of land for negligent acts of one working on his property but not as servant.

Cited in *New York v. Bailey*, 2 Denio, 433, holding that owner of land is responsible for negligent acts of persons employed in making erections upon it for his benefit, though relation of master and servant does not exist between owner and person so employed.

21 E. R. C. 235, *SMITH v. STEELE*, 2 Asp. Mar. L. Cas. 487, 44 L. J. Q. B. N. S. 60, L. R. 10 Q. B. 125, 32 L. T. N. S. 195, 23 Week. Rep. 388.

The "fellow servant" doctrine.

Cited in *Wilson v. Hume*, 30 U. C. C. P. 542, holding master is not liable to servant for injury caused by negligence of fellow servant, where master has been guilty of no personal negligence.

Cited in 6 *Thompson*, Neg. 177, on defenses to action for wrongful death at hands of fellow servant.

— Who are fellow servants.

Cited in *Wagner v. Boston Elev. R. Co.* 188 Mass. 437, 74 N. E. 919, holding that because they were not subject to control of common master, plaintiff was not in any sense fellow servant of defendant's employees; *Hughson v. Richmond & D. R. Co.* 2 App. D. C. 98, holding servant of sleeping car company not fellow servant of employees of railway company.

Distinguished in *Tozeland v. West Ham Union* [1906] 1 K. B. 538, 76 L. J. K. B. N. S. 514, 96 L. T. N. S. 519, 71 J. P. 194, 23 Times L. R. 325, 5 Local G. R. 507 [1907] 1 K. B. 920, holding that to constitute common employment there must be some voluntary bargain of servant to run risks of employment, and not merely a doing of work by compulsion of law.

Duty of owner toward persons invited upon his premises.

Cited in *McBeath v. Eastern S. S. Co.* 39 N. B. 77, holding that express messenger traveling in defendant's steamer was entitled to recover damages for injury caused by defective elevator.

Cited in notes in 46 L.R.A. 38, 109, on right of servant to recover damages from third persons for injuries in performance of duties; 19 E. R. C. 96, on liability to licensee for injury by defective or dangerous premises.

Cited in 4 Thompson, Neg 411, on liability of ship owners for injuries to compulsory pilots.

Distinguished in *Heaven v. Pender*, L. R. 9 Q. B. Div. 302, holding that doctrine of invitation does not apply to one who erects scaffolding for another for the use of such other's servants.

Volenti non fit injuria as defense to action by injured servants.

Cited in note in 47 L.R.A. 173, 194, on volenti non fit injuria as defense to actions by injured servants.

21 E. R. C. 240, *HAMMOND v. ROGERS*, 7 Moore, P. C. 160.

Respective duties of pilot and crew.

Cited in *Wood v. Smith*, L. R. 5 P. C. 451, 43 L. J. Prob. N. S. 11, 30 L. T. N. S. 439, 22 Week. Rep. 578, 3 Asp. Mar. L. Cas. 739, holding it is properly within province of pilot to judge of and direct manoeuvre of letting anchorage; *The Lotus*, 11 Lower Can. Rep. (Dec. Des. Tribunaux) 342, 2 Stuart, Adm. Rep. (Quebec) 58, holding mode, time and place of bringing vessel to anchor is within peculiar province of pilot who is in charge; *Ralli v. Troop*, 157 U. S. 386, 39 L. ed. 742, 15 Sup. Ct. Rep. 657, holding whole conduct of navigation of ship including duty of determining her course and speed, and time, place of anchoring her, belongs to pilot; *The China*, 7 Wall. 53, 19 L. ed. 67, holding it is duty of master to interfere in cases of pilot's intoxication or manifest incapacity, in cases of danger which he does not foresee, and in all cases of great necessity; *The Courier*, 2 Stuart, Adm. Rep. (Quebec) 91, holding that when pilot leaves deck of vessel, he ceases to be in charge and duty devolves upon officers and crew.

Statutory exemption of shipowner from liability for pilot's fault.

Cited in *Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique*, 63 Fed. 845, on necessity that fault be that of pilot alone in order to exempt owner; *The Velasquez v. Briggs*, 21 E. R. C. 282, L. R. 1 P. C. 494, 36 L. J. Prob. N. S. 19, 4 Moore, P. C. C. S. N. S. 426, 16 Week. Rep. 89, 16 L. T. N. S. 777, holding that if, for any act or omission which contributed to accident, master or crew is to blame, then although pilot is also to blame, owners are not exempted from liability; *Pollok v. McAlpin*, 21 E. R. C. 250, 7 Moore, P. C. 427, holding Act of Parliament only exonerates owners from liability, for ignorance and misconduct of pilot, and if orders of pilot are disobeyed, or duties which belong to master and crew are not properly performed, and accident under those circumstances occurs, owners remain liable; *The Abergeldie*, 2 Stuart, Adm. Rep. (Quebec) 187, holding owners of vessel which collided with another vessel at anchor liable, where moving vessel was in charge of pilot taken under compulsion and master certified pilot piloted vessel to his entire satisfaction.

Cited in note in 19 E. R. C. 219, on liability of ship owner for collision due to negligence of qualified pilot.

—Burden of proof.

Cited in *Camp v. The Marcellus*, 1 Cliff. 481, Fed. Cas. No. 2,347, holding burden is on owners to show, in order to bring their case within provisions of English statute, that pilot was alone in fault; *Rodrigues v. Melhuish*, 10 Exch. 110, 24 L. J. Exch. N. S. 26, 2 Week. Rep. 518, holding owners bound to show act causing damage was exclusively that of pilot; *The Iona*, L. R. 1 P. C. 426, 4 Moore, P. C. C. N. S. 336, 16 L. T. N. S. 158, holding owners must show damage for which it is sought to make them liable, was occasioned exclusively

by default of pilot; *North German Lloyd S. S. Co. v. Elder*, 21 E. R. C. 277, Lush. 239, 4 L. T. N. S. 160, 14 Moore, P. C. C. 241, holding that burden is on shipowner to prove that maneuver causing collision was ordered by pilot; *The China*, 7 Wall. 53, 19 L. ed. 67, holding party claiming exemption must show affirmatively that pilot was in fault, and that there was no fault on part of officers or crew which might have been in any degree conducive to damage.

Distinguished in *Marshall v. Moran*, L. R. 3 P. C. 205, 6 Moore, P. C. C. N. S. 492, 23 L. T. N. S. 218, holding that where owner comes into court unprepared to bear the burden of proof the court may decide from the evidence before it.

Collision with vessel at anchor.

Cited in *The Lincoln*, 1 Low. Dec. 46, Fed. Cas. No. 8,354, holding prima facie case is made out against vessel when it appears she has driven upon vessel at anchor.

Liability of steamship company for negligence.

Cited in *Guiterman v. Liverpool, N. Y. & P. Mail S. S. Co.* 9 Daly, 119, holding that, where goods were injured from want of proper care of vessel whilst she was taking in coal on rough night, injury prima facie resulted from negligence of steamship company.

21 E. R. C. 250, *POLLOK v. McALPIN*, 7 Moore, P. C. C. 427, reversing 3 W. Rob. 310, 14 Jur. 1074.

Relative duties of pilot and crew.

Cited in *The Courier*, 2 Stuart, Adm. Rep. (Quebec) 91, holding that when pilot left deck of vessel he ceased to be in charge and it became duty of officers and crew to take charge; *The Oakfield*, L. R. 11 Prob. Div. 34, 55 L. J. Prob. N. S. 11, 54 L. T. N. S. 578, 34 Week. Rep. 687, 5 Asp. Mar. L. Cas. 575, holding suggestion made to pilot by master does not take away pilot's responsibility; *Wood v. Smith*, L. R. 5 P. C. 451, 43 L. J. Prob. N. S. 11, 30 L. T. N. S. 439, 22 Week. Rep. 578, 3 Asp. Mar. L. Cas. 739, holding that manoeuvre of dropping anchor is one properly within province of pilot to judge of and direct.

Relative rights of vessels in motion and at rest.

Cited in *Padularoga v. Canadian Canning Co.* 12 B. C. 468, holding vessel in motion bound to avoid one at rest if possible; *The Virginia Ehrman* (*The Virginia Ehrman v. Curtis*) 97 U. S. 309, 24 L. ed. 890, holding vessels in motion are required to keep out of way of vessel at anchor, if latter is without fault; *Taylor v. The Prescott*, 13 Can. Exch. 424 (affirmed in C. R. [1910] A. C. 90), holding that collision between vessels may be inevitable accident when both parties made use of all reasonable means with due care, to prevent accident.

— Presumption in case of collision.

Cited in *Mills v. The Nathaniel Holmes*, 1 Bond, 352, Fed. Cas. No. 9,613, holding that where damage is done by boat in motion to one lying in proper place, presumption of wrong is against moving boat, and to avoid liability it must appear greatest caution and vigilance was observed; *La Bourgoyne*, 30 C. C. A. 203, 57 U. S. App. 706, 86 Fed. 475, holding that although vessel be anchored in improper place presumptions are prima facie against moving vessel colliding with one at anchor.

— Burden of proof.

Cited in *Amoskeag Mfg. Co. v. The John Adams*, 1 Cliff. 404, Fed. Cas. No. 338, holding that where ship was moored in proper place, and collision occurred,

burden of proof is upon moving vessel either to show vessel was without fault, or that disaster was result of fault on part of vessel moored; *The Clarita and The Clara* (*The Clara Clarita v. Cox*) 23 Wall. 13, 23 L. ed. 146, holding where one vessel was at anchor with signal light displayed, burden of proof was upon owners of steam tug with vessel in tow which collided with her to show that tug was without fault, or that collision was occasioned by fault of anchored vessel, or that it was result of inevitable accident.

"Inevitable accident" as applied to collisions at sea.

Cited in *The Baltic*, 2 Ben. 452, Fed. Cas. No. 23, holding inevitable accident, as respects colliding vessel, means that such vessel has endeavored, by every means in her power with due care and caution, and proper display of nautical skill to prevent collision; *The Michigan*, 52 Fed. 501; *Union S. S. Co. v. New York & V. S. S. Co.* 24 How. 307, 16 L. ed. 699,—holding collision which occurs when both parties have endeavored, by every means in their power, with due care and nautical skill, to prevent occurrence of accident is inevitable accident; *The Grace Gridler* (*Lockwood v. The Grace Gridler*) 7 Wall. 196, 19 L. ed. 113, holding highest degree of caution that can be used is not required; *Swift v. Brownell*, Holmes, 467, Fed. Cas. No. 13,695, holding that case is not one of inevitable accident where neither party proves that it has endeavored by every means in its power with due care and caution and with proper degree of nautical skill to prevent occurrence of accident.

Distinguished in *The Morning Light* (*Alliance Ins. Co. v. The Morning Light*) 2 Wall. 550, 17 L. ed. 862, holding collision resulting from darkness of night and without fault of either party, is properly to be regarded as inevitable accident.

—Apportionment of loss.

Cited in *The Atlas* (*Phoenix Ins. Co. v. The Atlas*) 93 U. S. 302, 23 L. ed. 863, holding that where neither party is in fault, and damage was result of unavoidable accident, rule that loss must be borne by party on whom it fell is one of universal application.

Liability of master of a vessel having an official pilot for his own negligence.

Cited in *Harbour Comrs. v. Grange*, 10 Lower Can. 259, holding that where a collision of a vessel with a wharf was due not only to the fault of the official pilot but also to negligence of the master and crew, the master was liable.

Right of master who is negligent to recover re-imbursement for damages paid.

Cited in *Leavitt v. Parks*, 7 N. B. 282, holding that a master who was negligent in proceeding with his vessel when he knew there was danger of collision cannot recover from the owner damages which he was obliged to pay to the owner of the injured vessel.

Taxation of costs.

Cited in *The Lotus*, 2 Stuart, Adm. Rep. (Quebec) 58, 11 Low. Can. 342, holding that when the injury to another vessel as a result of a collision was due solely to a pilot taken on board, as required by law, the suit should be dismissed without costs.

Right to impeach own witnesses.

Cited in *Thornton v. Thornton*, 39 Vt. 122; *Cox v. Eayres*, 55 Vt. 24, 45 Am. Rep. 583; *Adams v. Wheeler*, 97 Mass. 677,—holding that party cannot be allowed to prove by other witnesses statements previously made by witness called by

himself inconsistent with his testimony at trial; *Hurley v. State*, 46 Ohio St. 320, 4 L.R.A. 161, 21 N. E. 645, holding that in case witness denies having made certain statements, it is not competent for party calling him, to prove them by other witnesses.

Refreshment of memory of witness.

Cited in *Putnam v. United States*, 162 U. S. 687, 40 L. ed. 1118, 16 Sup. Ct. Rep. 923, holding that minutes of grand jury cannot be used to refresh memory of witness upon trial of action.

21 E. R. C. 267, *THE MONTE ROSA*, 7 Asp. Mar. L. Cas. 326, 62 L. J. Prob. N. S. 20, 68 L. T. N. S. 299, [1893] P. 23, 1 Reports, 557, 31 Week. Rep. 304.

21 E. R. C. 277, *NORTH GERMAN LLOYD S. S. CO. v. ELDER*, Lush. 239, 4 L. T. N. S. 160, 14 Moore, P. C. C. 241.

Proof entitling shipowner to exemption from liability for pilot's default.

The Iona, L. R. 1 P. C. 426, 4 Moore, P. C. C. N. S. 336, 16 L. T. N. S. 158; *The Velasquez v. Briggs*, 21 E. R. C. 282, L. R. 1 P. C. 494, 36 L. J. Prob. N. S. 19, 4 Moore, P. C. C. N. S. 426, 16 Week. Rep. 89, 16 L. T. N. S. 777,—holding owners must prove collision was caused solely by fault of pilot to be entitled to exemption; *The Abergeldie*, 2 Stuart, Adm. Rep. (Quebec) 187, holding owners of moving vessel which collided with one at anchor liable in case of doubt as to blame, where master certified that pilot compulsorily taken on board vessel piloted her to his entire satisfaction.

Distinguished in *The Livia*, 25 L. T. N. S. 887, 1 Asp. Mar. L. Cas. 284, as not requiring owners to call pilot in support of their case where fact that he gave orders which were obeyed has been already established.

Relative duties of pilot and crew.

Cited in *The Courier*, 2 Stuart, Adm. Rep. (Quebec) 91, holding master, officers, or crew of vessel are not discharged from their obligation to keep good lookout and observe ordinary rules of navigation by reason of pilot being on board.

Requisites for a reversal on appeal.

Cited in *Henderson v. Grand Trunk R. Co.* 20 U. C. Q. B. 602, holding that in order to advise reversal of judgment court must not merely doubt whether it is right but be satisfied it is wrong; *Parks v. Cahoon*, 23 Can. S. C. 92, upholding decision of trial judge upon question of fact.

Appeal on question of fact.

Cited in *North British & M. Ins. Co. v. Tourville*, 25 Can. S. C. 177, holding that if sufficiently clear case is made out court will allow appeal on mere question of fact against concurrent findings of two courts.

21 E. R. C. 282, *THE VELASQUEZ v. BRIGGS*, L. R. 1 P. C. 494, 36 L. J. Prob. N. S. 19, 4 Moore, P. C. C. N. S. 426, 16 Week. Rep. 89, 16 L. T. N. S. 777.

Proof exempting shipowner from liability for default of pilot.

Cited in *The Ben Mohr*, 52 Week. Rep. 686, holding persons who rely on plea of compulsory pilotage, must prove by trustworthy evidence that fault was fault of pilot alone, otherwise court cannot act in finding that fault was that of pilot.

Liability for marine collision as altered by statute.

Distinguished in *Hamburg Packet Co. v. Desrochers*, 8 Can. Exch. 263, distinguishing between English cases decided before and after 1873, when The Merchant Shipping Act was passed.

21 E. R. C. 289, *THE GENERAL PALMER*, 2 Hagg. Adm. 176.

Right of pilot to salvage.

Cited in *The Adventurer*, 1 Stuart, Adm. Rep. (Quebec) 101, holding pilots are not in strictness entitled to salvage, their duties are necessarily hazardous but under extraordinary circumstances of peril or exertion they become entitled to an extra pilotage as for service in nature of salvage service.

Conclusiveness of tender in admiralty.

Cited in *Lubker v. The A. H. Quinby*, Fed. Cas. No. 8,586, 7 W. N. C. 509, holding that admiralty court may after tender for good cause, reduce amount, and decree less sum to libellant; *The Mona* [1894] P. 265, 63 L. J. Prob. N. S. 137, 6 Reports, 707, 71 L. T. N. S. 24, 43 Week. Rep. 173 7 Asp. Mar. L. Cas. 478, holding defendants entitled to difference between amount paid into court and amount found due.

21 E. R. C. 292, *AKERBLOM v. PRICE*, 50 L. J. Q. B. N. S. 629, 44 L. T. N. S. 837, L. R. 7 Q. B. Div. 129, 29 Week. Rep. 798.

Circumstances rendering pilot a salvor.

Cited in *The Petunia*, N. F. (1897-03) 323, holding that in order that pilot may be entitled to salvage reward, he must show that ship was in danger of being lost, and such as to call upon him to run such unusual danger, or exercise such unusual skill, as to make it unfair and unjust that he should be paid otherwise than by salvage reward; *The Santiago*, 83 L. T. N. S. 439, 17 Times L. R. 22, 70 L. J. Prob. N. S. 12, 9 Asp. Mar. L. Cas. 147, holding pilot in charge of vessel towing vessel in distress, is entitled to share of salvage.

Cited in note in 30 L.R.A.(N.S.) 658, on right of servant to remuneration for extra work.

Cited in *Hughes* Adm. 131, on right of pilot to claim salvage.

Validity of agreement for salvage services or emergency towage.

Cited in *Morse v. Pomeroy Coal Co.* 75 Fed. 428, holding that where owners of cargo give bond to owner of vessel, covering expenses incurred in rescuing stranded vessel, such owners are liable for their proportion of expenses paid by owner and approved by arbitrators; *Dunsmuir v. The Harold*, 3 B. C. 128, 4 Exch. Can. 226, holding that concealment by owners of ship of fact that ship is in leaky condition, avoids contract to tow her to port for specified sum; *The Dracona v. Connolly*, 5 Can. Exch. 207, holding that if agreement for salvage services was just and reasonable when entered into, it will not be disregarded because something has happened to make it more onerous than was anticipated; *The Medina*, N. F. (1897-03) 146, holding that where master of sealing vessel came upon disabled steamer and refused to take crew of wrecked vessel aboard for less than all seals on wrecked vessel of value of \$4,000, agreement to give them was not enforceable; *The Strathgarry* [1895] P. 264, 11 Reports, 783, 72 L. T. N. S. 900, 8 Asp. Mar. L. Cas. 19, holding agreement requiring payment of five hundred pounds for half hours towage of vessel so that its engines might be got under way was not unjust.

Cited in *Hughes*, Adm. 141, as to when salvage contract is binding.

Notes on E. R. C.—128.

21 E. R. C. 301, DONALD v. SUCKLING, 12 Jur. N. S. 795, 35 L. J. Q. B. N. S. 232, L. R. 1 Q. B. 585, 14 L. T. N. S. 772, 15 Week. Rep. 13.

Contract of pledge or pawn.

Cited in *Samson v. Rouse*, 72 Vt. 422, 48 Atl. 666, holding that agreement to make pledge does not constitute pledge, and pledgee acquires no right of property until delivery is made; *Burdick v. Sewell*, L. R. 10 Q. B. Div. 363, 52 L. J. Q. B. N. S. 428, 48 L. T. N. S. 705 (affirmed in L. R. 10 App. Cas. 76), holding legal effect of contract by way of pawn or pledge is that only special property passes from borrower to lender, although coupled with power of selling pledge and transferring whole property in it on default in payment at stipulated time, if there be any, or at reasonable time after demand and nonpayment, if no time for repayment be agreed upon.

— Rights and duties of pledgee.

Cited in *Union Nat. Bank v. Post*, 55 Ill. App. 369, to the point that pledgor of note could not while debt remained unpaid bring action upon any right to possession; *First Nat. Bank v. Boyce*, 78 Ky. 42, 39 Am. Rep. 198, holding that although factor has no right to pledge goods of principal, yet amount sought to be recovered of innocent pledgee by consignor must be reduced by sum due from him to factor; *Milliken-Helm Commission Co. v. C. H. Albers Commission Co.* 244 Mo. 38, 147 S. W. 1065 (dissenting opinion), on right of pledgor of goods to convey his interest to third person; *Gaty v. Halliday*, 8 Mo. App. 118, holding that pledgee of stock is entitled to dividends accruing while he holds the stock; *McQuarrie v. Duggan*, 44 N. S. 185 (dissenting opinion), on right of cabman to hold baggage as pledge for payment of fare of owner; *Gilligan v. National Bank* [1901] 2 Ir. Q. B. 513, on duty of pledgee to take due care of pledge and deliver it upon payment by pledgor; *Webb v. Whinney*, 18 L. T. N. S. 523, 16 Week. Rep. 973, holding position of pledgee gives right to keep possession of goods pledged or to transfer his interest to others.

Cited in note in 9 E. R. C. 318, on detainer as gist of action of detainee.

Unauthorized disposition of pledge.

Referred to as leading case in *Ames v. Sutherland*, 9 Ont. L. Rep. 631, on continuance of contract and of pledgee's interest in the pawn notwithstanding his unauthorized disposition thereof.

Cited in *Sheridan v. Presas*, 18 Misc. 180, 41 N. Y. Supp. 451, holding that pledgee's dealing with pledged rings as though they were exclusively his own by making absolute gift of them and altering them to suit fancy of donee, before any default on part of pledgor, amounts to conversion.

— Sale of property by pledgee.

Cited in *Hopper v. Smith*, 63 How. Pr. 34, holding sale by pledgee does not ipso facto amount to conversion and cases of sales by factors and agents are not in conflict with such rule; *Schaaf v. Fries*, 90 Mo. App. 111, holding contract of bailment is not extinguished by wrongful sale, but merely broken; and pawnee or his vendee may retain pawn until debt is satisfied or satisfaction offered notwithstanding such breach; *Glidden v. Mechanics' Nat. Bank*, 53 Ohio St. 588, 43 L.R.A. 737, 42 N. E. 995, holding sale of pledged property to himself by pledgee, sale having been repudiated by pledgor, is not a conversion where no change has occurred in actual condition and situation of property; *Halliday v. Holgate*, L. R. 3 Exch. 299, 37 L. J. Exch. N. S. 174, 18 L. T. N. S. 656, 17 Week. Rep. 13, holding immediate right to possession of shares of stock is not revested in assignee of bankrupt pledgor by wrongful sale thereof by pledgee.

Distinguished in *Read v. Lambert*, 10 Abb. Pr. N. S. 428, holding defendant liable for damages caused by sale of stocks held by him as security for advances.

— Repledge.

Cited in *Clark v. Baillie*, 19 Ont. L. Rep. 545, on repledge of property by party holding it as collateral; *Goodwin v. Massachusetts Loan & T. Co.* 152 Mass. 189, 25 N. E. 100, holding attempt of consignee to pledge property for loans in addition to advances of consignee to consignor, without authority of consignor, is in fraud of consignor's rights.

Distinguished in *Longstreet v. Phile*, 39 N. J. L. 63, distinguishing between character and extent of property which bailee has in a pawn and goods held under bailment for him and holding that in former he has qualified property, which attaches to pledge, and may exist after he has parted with possession, that he may pledge the property for his own debt without such forfeiture of his rights that bailor can, without payment of loan secured get their possession; *Clarkson v. Snider*, 10 Ont. Rep. 561, as not authorizing a pledgee to transfer his interest in the pledge subject to the rights of the pledgor.

— Tender or discharge of debt as prerequisite to recovery.

Cited in *German Sav. Bank v. Renshaw*, 78 Md. 475, 28 Atl. 281, holding that when amount due from first pledgor to first pledgee is not discharged, condition upon which former is entitled to return of property has not been met; *Cumnock v. Newburyport Inst. for Sav.* 142 Mass. 342, 56 Am. Rep. 679, 7 N. E. 869, holding tender of payment of debt is required to enable pledgor to maintain trover for conversion of property pledged unless lien created by pledge has been otherwise discharged; *Byrne v. Weidenfeld*, 113 App. Div. 451, 99 N. Y. Supp. 412, holding that if at time of alleged conversion, defendants, with assent of plaintiff and for their joint benefit, had pledged securities of plaintiff, then, until debt of pledgee was tendered or discharged, pledgee and not plaintiff was entitled to possession; *New York, L. E. & W. R. Co. v. Davies*, 38 Hun, 477, holding conversion by pledgee does not amount to such destruction of his special interest in collateral as to destroy contract of pledge, and entitle pledgor to demand return of collateral without tender or payment of his debt; *Talty v. Freedman's Sav. & T. Co.* 93 U. S. 321, 23 L. ed. 886, holding pledgor cannot recover in replevin from purchaser from pledgee without first tendering to purchaser amount of his debt to pledgee; *Yardley v. Philler*, 25 L.R.A. 824, 10 C. C. A. 562, 17 U. S. App. 647, 62 Fed. 645, holding transferee of pledge has right to hold it until debt for which it was given is paid.

Distinguished in *Mulliner v. Florence*, L. R. 3 Q. B. Div. 484, 47 L. J. Q. B. N. S. 700, 38 L. T. N. S. 167, 26 Week. Rep. 385, as inapplicable to a case of lien; *Rush v. First Nat. Bank*, 17 C. C. A. 627, 36 U. S. App. 248, 71 Fed. 102, holding where pledgee bank sold to itself collateral and credited amount on defendant's note, and then sued to recover balance that such sale may be set up as defense without previous tender by defendant.

Disapproved in *Austin v. Vanderbilt*, 48 Or. 206, 6 L.R.A.(N.S.) 298, 120 Am. St. Rep. 800, 85 Pac. 519, 10 Ann. Cas. 1123, holding that in action of conversion by pledgor against pledgee it is not necessary to allege or prove tender as condition precedent to right to maintain action.

Distinction between pledge and lien.

Cited in *Steeves v. Cowie*, 40 N. S. 401, on distinction between lien and pledge as regards power of sale; *Hayward v. Grand Trunk R. Co.* 32 U. C. Q. B. 392, distinguishing between pledge and lien and holding that in cases of pledge,

property need not necessarily remain with pledgee, but may be left in care and possession of pledgor.

— Between pledge and mortgage.

Cited in *McBride v. Gore Dist. Mut. F. Ins. Co.* 30 U. C. Q. B. 451, distinguishing between pledge and mortgage; *West Cumberland Iron & Steel Co. v. Winnipeg & H. B. R. Co.* 6 Manitoba L. Rep. 388, on distinction between pledge and mortgage.

Nature and extent of unpaid seller's claim on goods sold.

Cited in Benjamin, Sales, 5th ed. 820, on nature and extent of unpaid seller's claim on goods sold; Benjamin, Sales, 5th ed. 223, on effect on acceptance of goods of reservation of special interest to seller after delivery.

Waiver or forfeiture of lien.

Cited in *Fishell v. Morris*, 57 Conn. 547, 6 L.R.A. 82, 18 Atl. 717, holding that any parting with possession operates as waiver or forfeiture of common law lien.

Cited in note in 16 Eng. Rul. Cas. 145, on loss of lien by parting with possession.

Sale of property held as security for debt.

Cited in *Bingham v. Bettison*, 30 U. C. C. P. 438, holding mortgagee liable to mortgagor for seizing and selling goods before default by mortgagor, and preventing mortgagor from redeeming; *Dahill v. Booker*, 140 Mass. 308, 54 Am. Rep. 465, 5 N. E. 496, holding sale of goods by mortgagee after breach of condition by mortgagor and seizure by mortgagee does not of itself import repudiation of mortgage or determine title under it; *Croze v. St. Mary's Canal Mineral Land Co.* 143 Mich. 514, 114 Am. St. Rep. 677, 107 N. W. 92, holding that sale of mortgaged chattels by mortgagee in possession on credit does not constitute conversion, but only renders him liable to mortgagor on same basis as if he had received cash; *Cochrane v. Boucher*, 3 Ont. Rep. 462, holding that where mortgaged goods are wrongfully sold under mortgage beyond mortgage debt, mortgagor is entitled to amount beyond such mortgage debt; *McMillan v. Byers*, 3 Manitoba L. Rep. 361, holding lien on property for hauling of same carries with it no right of sale and exists only so long as possession is retained; *Troop v. Hart*, 7 Can. S. C. 512 (dissenting opinion), on resale by unpaid vendor having lien or right to retain; *Hefferman v. Berry*, 32 U. C. Q. B. 518, on necessity of tender of unpaid purchase money before trover is brought for wrongful resale by unpaid vendor.

Conversion by agent or pledgee.

Cited in *Clarke v. Baillie*, 45 Can. S. C. 50, Ann. Cas. 1912B, 548, holding that broker must at all times be in position to hand over stock to his client, and if as result of his pledging it, he puts himself in position where he is not able to do so, he is guilty of conversion.

Cited in 2 Cooley, Torts, 3d ed. 871, on repledging of personal property by pledgee as conversion.

Right to possession as prerequisite to action of trover.

Cited in Benjamin, Sales, 5th ed. 948, on buyer's right to maintain trover only when he is entitled to possession.

Payment of price as prerequisite to right of possession.

Cited in *Wilkins v. Redding*, 70 Neb. 182, 97 N. W. 238, holding that pledgor cannot recover property pledged in replevin without paying or tendering whole amount of debt and keeping tender good; *Rogers v. Devitt*, 25 Ont. Rep. 84,

holding neither trespass nor trover lay for taking away of property, title to which had vested in plaintiffs under chattel mortgage but for which they had not paid the price.

Measure of damages for conversion.

Cited in *West v. Rutledge*, 17 N. B. 674, holding the measure of damages for the conversion of logs conveyed to plaintiff partly as satisfaction of debt was the value of the logs and not the amount of debt.

21 E. R. C. 337, *REX v. MUNDAY*, 1 Strange, 190.

Common law obligation to support relatives.

Cited in *Dawson v. Dawson*, 12 Iowa, 512; *Lebannon v. Griffin*, 45 N. H. 558,—holding there is no legal obligation at common law to support parent; *Wethersfield v. Montague*, 3 Conn. 507, holding child is under no common law liability to support his parents or grand parents.

—Obligation under statute.

Cited in *Edwards v. Davis*, 16 Johns. 281, holding liability of child to support its parents, who are infirm, destitute or aged, is wholly created by statute, and statute imposes on such relatives duties unknown to common law; *Chesterfield v. Hart, Smith* (N. H.) 350, holding that a husband is not liable for the support of the wife's grandmother; *Poor Comrs. v. Gansett*, 2 Bail. L. 320, holding son-in-law not liable for support of his wife's father and mother; *Mack v. Parsons, Kirby*, 155, 1 Am. Dec. 17, holding son-in-law not bound to support wife's mother under statute requiring certain persons to be supported by their relatives standing in line or degree of father or mother, grand-father or grand-mother, children or grand-children; *Minden v. Cox*, 7 Cow. 235, holding that husband is not bound to maintain his wife's bastard children; that statute compelling children and parents to maintain each other, being of sufficient ability, extends only to natural relations; *Hillsborough v. Deering*, 4 N. H. 86, holding father not bound by law to support illegitimate child of his daughter, such child not being his grandchild within meaning of statute.

21 E. R. C. 339, *FLANNAGAN v. BISHOP WEARMOUTH*, 8 El. & Bl. 451, 3 Jur. N. S. 1103, 27 L. J. Mag. Cas. N. S. 46, 8 Week. Rep. 38.

Duty of husband to support wife.

Cited in *People v. Pettit*, 2 Cow. Cr. 495, holding that there was no breach of a recognizance given upon conviction of a husband for being a disorderly person for not supporting his wife and children when at the time of the execution of the bond the husband and wife were living separate and the husband, who had left his former home, offered to take the wife and children to his father's house and support them; *Regina v. Leclair*, Rap. Jud. Quebec, 7 B. R. 290, holding that a husband is not criminally liable as a vagrant for nonmaintenance of his wife where she left the home without his consent and refused to return and he was willing to take her back, and maintain her according to his means; *Regina v. Nasmith*, 42 U. C. Q. B. 246, holding that a conviction of a husband for neglecting to provide for his wife who was not living with him should be quashed when it was not shown that she was in need and that the husband had the means to supply her wants.

Distinguished in *Thomas v. Alsop*, 21 E. R. C. 343, 39 L. J. Mag. Cas. N. S. 43, 21 L. T. N. S. 715, L. R. 5 Q. B. 151, 18 Week. Rep. 454, holding that justices had jurisdiction to order husband to support wife whom he had ill-used, although she had refused his offer to provide her a home.

21 E. R. C. 343, THOMAS v. ALSOP, 39 L. J. Mag. Cas. N. S. 43, 21 L. T. N. S. 715, L. R. 5 Q. B. 151, 18 Week. Rep. 454.

Statutory duty to support wife.

Cited in *R. v. Nasmith*, 42 U. C. Q. B. 242, holding that in statutory prosecution, it is necessary to prove that defendant is husband of prosecutrix, that wife was in need of food, clothing, or lodging, and that husband was able to provide same, but wilfully and without lawful excuse refused or neglected to do so.

21 E. R. C. 349, RE D'ANGIBAU, 49 L. J. Ch. N. S. 182, 41 L. T. N. S. 645, 28 Week. Rep. 311, affirmed by the Court of Appeal, 2 E. R. C. 281, L. R. 15 Ch. Div. 228, 43 L. T. N. S. 135, 28 Week. Rep. 930.

Distinction between power and property.

Cited in *Pouey v. Hordern* [1900] 1 Ch. 492, 69 L. J. Ch. N. S. 231, 82 L. T. N. S. 51, 16 Times L. R. 191, on the distinction between power and property.

21 E. R. C. 356, BRISTOW v. WARDE, 2 Ves. Jr. 336, 2 Revised Rep. 235.

Construction of powers.

Cited in *Reed v. McIlvain*, 113 Md. 140, 77 Atl. 329, holding that limitations made in exercise of power of appointment must be construed as if they were inserted in instrument creating power; *Wilson v. Troup*, 2 Cow. 195, 14 Am. Dec. 458, on the rules of construction as to powers in general.

— Intention as governing.

Cited in *Taggart v. Stanbery*, 2 McLean, 543, Fed. Cas. No. 13,724, holding that the creation, execution and destruction of powers depend on the substantial intention and purpose of the parties: *Thompson v. Garwood*, 3 Whart. 287, 31 Am. Dec. 502, holding that a power general in terms will not be cut down to a particular power unless there is an apparent intent.

— Doctrine of cy pres.

Cited in *Ferguson v. Ferguson*, 39 U. C. Q. B. 232, on the application of the doctrine of cy pres.

Cited in note in 21 Eng. Rul. Cas. 464, on application of cy pres doctrine.

Cited in *Gray*, Perpet. 2d ed. 486, on right of unborn person to take fee cy pres.

Who may reserve power of disposition over property.

Cited in *Re Patterson*, 5 Manitoba L. Rep. 274, holding that makers of settlement in trust may reserve to themselves power of disposition over property, which could be exercised only by themselves jointly.

Marriage settlement as creating a particular power.

Cited in *Boyce v. Waller*, 9 Dana, 479, on marriage settlements being made for the benefits of the children so as to defeat invalid appointment.

Distinguished in *Minton v. Kirwood*, 21 E. R. C. 371, 12 Jur. N. S. 86, L. R. 1 Eq. 449, 13 L. T. N. S. 743, 14 Week. Rep. 274, holding that a marriage settlement, which gave the lady's property to the wife for life, remainder to the husband for life remainder to such uses and trusts as the wife should appoint, or in default of appointment to go to the issue, the power of appointment was general.

Illusory execution of a power.

Cited in *Russell v. Kennedy*, 66 Pa. 248, holding that where the wife was given the power to appoint two lots among the children, a devise to one child of one lot was a valid execution, where the other was left undisposed of; *Herrick v. Fowler*, 198 Tenn. 410, 67 S. W. 861, holding that the giving of a mere nominal sum in the

execution of the power, was sufficient, where the donee had advanced the money to the complaining party before executing the power.

Proper appointment of power as void for excess in part.

Cited in *Lawrence's Estate*, 136 Pa. 354, 11 L.R.A. 85, 20 Am. St. Rep. 925, 26 W. N. C. 537, 20 Atl. 521, holding that an appointment for life will be good even though the remainder be too remote.

Doctrine of election.

Cited in *Mutchmor v. Mutchmor*, 8 Ont. L. Rep. 271, on the application of the doctrine of election; *Graham v. Whitridge*, 99 Md. 248, 66 L.R.A. 408, 57 Atl. 609, holding that the doctrine of election is not applicable to a case where no other property is disposed of by the donee of the power than that over which he has the power of appointment; *Carper v. Crawl*, 149 Ill. 465, 36 N. E. 1040, holding where a testator gave to his wife certain lands and personalty, which was less than her dower right, the will not giving her what she would not have without it, she was not put to her election; *Fiske v. Fiske*, 173 Mass. 413, 53 N. E. 916, holding that a widow who has waived the provisions of her husband's will can not avail herself of a provision in the will for her which operates as an appointment of property under a trust deed.

Acceleration of second estate because first is void.

Cited in 2 *Washburn*, Real Prop. 6th ed. 633, on acceleration of second estate because first is void.

21 E. R. C. 371, *MINTON v. KIRWOOD*, 12 Jur. N. S. 86, L. R. 1 Eq. 449, 13 L. T. N. S. 743, 14 Week. Rep. 274, affirming the decision of the Vice Chancellor, reported in 37 L. J. Ch. N. S. 606, L. R. 3 Ch. 614, 18 L. T. N. S. 781, 16 Week. Rep. 991.

Intention of donor as governing construction of a power.

The decision of the Vice-Chancellor was cited in *Heasman v. Pearse*, L. R. 11 Eq. 522, 40 E. J. Ch. N. S. 258, 24 L. T. N. S. 864, 19 Week. Rep. 673, on the intention of the donor as governing the construction of a power.

Proper parties in action for specific performance.

The decision of the Vice-Chancellor was cited in *Real Estate Loan Co. v. Molesworth*, 3 Manitoba L. Rep. 116, holding that a mortgagee could not enforce a contract of sale of the mortgaged lots as against the purchaser.

21 E. R. C. 379, *HERVEY v. HERVEY*, 1 Atk. 561, 9 Mod. 253, Barn. Ch. 103, 2 Eq. Cas. Abr. 669, pl. 20.

Jurisdiction of equity to remedy defective execution of power.

Cited in *Conover v. Brown*, 49 N. J. Eq. 156, 23 Atl. 507, on the jurisdiction of a court of equity to remedy the defective execution of a power; *Doe ex dem. Tiffany v. Miller*, 10 U. C. Q. B. 65, on remedying the defect in the execution of a power by subsequent acts; *Ames v. Seudder*, 11 Mo. App. 168, holding that a court in remedying a defective execution of the power will reform only that which transcends it; *Allison v. Kurtz*, 2 Watts, 185, holding that conveyance by one who was executor, with full power to sell, shall be construed to be execution of power contained in will, although that power be not recited.

— Provisions for wife.

Referred to as a leading case in *Cowdrey v. Cowdrey*, 71 N. J. Eq. 353, 64 Atl. 98, holding that an unsealed writing by a husband reciting that he gave his wife a certain house and lot, the writing being executed in pursuance of an

antenuptial promise will authorize the widow to recover the property by a suit in equity.

Liability of father for support of his infant children.

Cited in *Addison v. Bowie*, 2 Bland. Ch. 606, holding that father so far as he is able is bound to maintain his infant children.

Execution of power at different times.

Cited in *Asay v. Hoover*, 5 Pa. 21, 45 Am. Dec. 713, holding that a married woman with power to sell mortgage or devise in fee, lands under a marriage settlement may mortgage same and then devise it subject to the mortgage; *Jackson ex dem. Jones v. Striker*, 1 Johns. Cas. 284, holding that power over legal estate, defectively executed at first, may be executed over again, and last execution shall stand, first being nullity.

Partial validity of lease for longer period than allowed by law.

Cited in *North Vancouver Ferry & Power Co. v. Bunbury*, 16 B. C. 170, on validity in part of lease for longer period than allowed by law; *Vancouver Lumber Co. v. Vancouver*, 15 B. C. 432, holding that lease by city for longer period than that permitted by order of council is valid for period for which it was authorized.

Right of trustees to reduce annuity allowed by will.

Cited in *Mason v. Jones*, 13 Barb. 461, holding that trustees had no power to reduce annuity from amount fixed by will creating annuity.

Surrender supplied.

Cited in *Chapman v. Gibson*, 21 E. R. C. 390, 3 Bro. Ch. 229, holding that surrender will be supplied for the wife against a distant heir not provided for by the testator, though provided for otherwise.

Undue influence as avoiding a conveyance.

Cited in *Sears v. Shafer*, 1 Barb. 408, on the avoiding of conveyances because of undue influence; *Owings's Case*, 1 Bland. Ch. 370, 17 Am. Dec. 311, holding that imposition practised upon weakness by him who is trusted is the most odious species of fraud.

Effect of conveyance by husband to wife.

Cited in note in 69 L.R.A. 368, on effect of conveyance by husband to wife.

21 E. R. C. 390, *CHAPMAN v. GIBSON*, 3 Bro. Ch. 229.

Validity of execution of power.

Cited in *Wooster v. Cooper*, 59 N. J. Eq. 204, 45 Atl. 381, holding that power to dispose of lands given to be exercised inter vivos will not be well exercised by last will of donee in favor of volunteer, while such exercise would defeat gift over.

Distinguished in *Re McAuliffe*, 50 L. T. N. S. 353, holding that where the tenant for life had power of appointment to uses, a deed poll to enable them to sell any part of the land free from the portions charged on the estate by the tenant for life, gave the trustees power to sell free from portions, as an execution of the power.

—Aid by court of equity.

Cited in *Thomas v. Ohio State University*, 70 Ohio St. 92, 70 N. E. 896, on the point that where a person having power over an estate, shows an intention to execute the power the court will require the person benefiting to perfect this intention; *Re Mackenzie*, 28 Ont. Rep. 312, holding that where trustee invested funds at request of settlor contrary to terms of trust, court might aid such defective execution of power as there was no breach of trust

Right of child to allowance out of legacy for support during minority.

Cited in *Seibert's Appeal*, 19 Pa. 49, holding that whether legacy by parent to child or grandchild be vested or contingent on his arrival at lawful age, legatee during minority may have allowance out of interest for support.

21 E. R. C. 397, *MARLBOROUGH v. GODOLPHIN*, 2 Ves. Sr. 61.

Construction of a power of appointment.

Cited in *Re Harbeck*, 43 App. Div. 188, 59 N. Y. Supp. 362, holding that those who take under power of appointment take as though their names were in grant of power; *Dominick v. Sayre*, 3 Sandf. 555; *Hutchinson v. Hutchinson*, 13 Ir. Eq. Rep. 332,—on the construction of a power.

—Instrument executing power as relating back to one creating it.

Cited in *Clark v. Wilson*, 53 Miss. 119, on the execution of a power as relating back to the instrument creating it; *Townshend v. Frommer*, 25 Jones & S. 90, 5 N. Y. Supp. 442, holding that when act which is condition of existence of future use is done but not until then, is rule to be applied, that appointment relates back to deed of grantor of power; *Re Bowles* [1905] 1 Ch. 371, 74 L. J. Ch. N. S. 338, 92 L. T. N. S. 556, on the relation of the appointee's title, back to the instrument creating the power; *Christy v. Pulliam*, 17 Ill. 59, holding that the appointee derives his title not from the person exercising the power but from the instrument creating it; *Doolittle v. Lewis*, 7 Johns. Ch. 45, 11 Am. Dec. 389, holding that the title rests upon the act creating the power and takes effect as if created by the original deed; *Wills v. Cowper*, 2 Ohio, 124, holding a person in whose favor the instrument is executed takes title under the power itself the same as though the instrument and power were contained in one instrument; *Bancroft v. Ashhurst*, 2 Grant, Cas. 513, holding that a purchaser from trustees under a deed of trust takes title as though the power and the instrument executing it, were combined in one instrument; *Tudor v. Tudor*, 80 Vt. 220, 130 Am. St. Rep. 977, 67 Atl. 539, holding that the source of the title under an executed power was in the party creating the power and not the donee; *Doak v. Bank of State*, 28 N. C. (6 Ired. L.) 309, holding that an appointment is not a conveyance and the estate of the appointee takes effect as though created in the instrument creating the power; *Re Harbeck*, 161 N. Y. 211, 55 N. E. 850 (reversing 43 App. Div. 188, 59 N. Y. Supp. 362); *Com. v. Williams*, 13 Pa. 29,—holding that those who take under an appointment of power take as if their names were in the grant of the power; *Emmons v. Shaw*, 171 Mass. 410, 50 N. E. 1033, holding that because the execution of the power relates back to the instrument creating it, the estate of the donor is the one to be taxed under a tax upon legacies and successions; *Re Dowsett* [1901] 1 Ch. 398, 71 L. J. Ch. N. S. 149, 49 Week. Rep. 268, holding that in every case the appointment is not read as though contained in the instrument creating the power; *Jackson ex dem. Henderson v. Davenport*, 20 Johns. 537, holding that a deed executing a power will not relate back to the instrument creating the power, if thereby the lawful rights of a third party are defeated.

Distinguished in *Pearce v. Van Lear*, 5 Md. 85, holding that where the testatrix by her will directed her executors to free certain slaves, the issue of these slaves born after her death, would be freed because of relation back to the death of the testatrix.

Disposal of lands in case of lapse of appointment.

Cited in *Milhollen v. Rice*, 13 W. Va. 510, as contradicting the rule of an

earlier leading case, since approved, on disposal of lands in case of death of appointee before taking.

Distinguished in *Wisner v. Ogden*, 4 Wash. C. C. 631, Fed. Cas. No. 17,914, holding that where the wife was named as a residuary legatee, but certain debts were excepted from a devise of all personalty and realty she did not take them as the residuary legatee; *Evans's Estate*, 10 Pa. Dist. R. 261, 25 Pa. Co. Ct. 266, holding that where the donee exercises power of the devisees and legatees of the donor's will to whom the gift over had been made, the interests of the appointees under the donor's will is not divested if they die before the donee.

Execution of a power of appointment.

Cited in note in 64 L.R.A. 913, on execution by will of power of appointment.

— Test of execution.

Cited in *Brewer's Estate*, 16 Pittsb. L. J. N. S. 161, holding that test of good execution of power is conformity to terms and purposes of the power.

Execution of a power of appointment not exercised.

Cited in *Re Rispin*, 25 Ont. L. Rep. 633, Ann. Cas. 1912D, 1172, holding that under devise of residue of estate to executor in trust to pay income and principal, in whole or in part, to son in executor's discretion, amount remaining in executor's hands at son's death, was intestate property; *Vane v. Dungannon*, 2 Sch. & Lef. 118, 9 Revised Rep. 63, on the execution of a power in default of appointment; *Salisbury v. Denton*, 26 L. J. Ch. N. S. 851, 3 Kay. & J. 529, 3 Jur. N. S. 740, 5 Week. Rep. 865, holding that where there was a gift to a person and a power of appointment over to two classes, and the power was not exercised, the two classes took equally.

Distinguished in *Brown v. Higgs*, 5 Ves. Jr. 495, 8 Ves. Jr. 561, 4 Revised Rep. 323, holding that where the party is required to execute a power as a duty, the court will enforce it, if he fails, for the benefit of those for whom he was to execute it; *Burrough v. Philcox*, 5 Myl. & C. 73, 5 Jur. 453, holding that where a gift was made to two persons, with a power of appointment to the survivor to be disposed of to a class, there was an implied trust created in favor of that class, which the court would enforce.

Disapproved in *Re Caplin*, 34 L. J. Ch. N. S. 578, 2 Drew. & S. 527, 6 New Reports, 517, 11 Jur. N. S. 383, 12 L. T. N. S. 526, 13 Week. Rep. 646, holding that where there was a gift to another with the power of appointment to a class, and no gift over in default of appointment, there was an implied trust in favor of the class; *Wilson v. Duguid*, L. R. 24 Ch. Div. 244, 53 L. J. Ch. N. S. 52, 49 L. T. N. S. 124, 31 Week. Rep. 945, holding that when there is a general intention in favor of a class, and a particular intention in favor of particular individuals of that class to be selected by a third person, and the latter intention fails from the selection not being made the court will give effect to the general intention in favor of the class; *Pocock v. Atty. Gen.* L. R. 3 Ch. Div. 342, 46 L. J. Ch. N. S. 795, 35 L. T. N. S. 575, 25 Week. Rep. 277, on the construction of a power, not exercised.

Rights of purchasers of property sold in execution of power.

Cited in *Satterfield v. Tate*, 132 Ga. 256, 64 S. E. 60, holding that where purchaser had notice at time of conveyance of executor's lack of power to sell, under circumstances he took only such interest as devisee had who executed deed at request of executor; *Sears v. Livermore*, 17 Iowa, 297, 85 Am. Dec. 564, holding that purchaser of property sold in execution of power of sale, is charged with notice of extent of power, and is bound to see that it has been pursued.

Rights of purchasers at sheriff's sale.

Cited in *Jackson ex dem. New Loan Officers v. Bull*, 1 Johns. Cas. 81, holding that purchaser under sheriff's sale takes under judgment and execution.

Time when appointment by will takes effect.

Cited in *Re Johnson*, 1 Power, 68, on the time of taking effect of the power; *Thuresson v. Thuresson*, 2 Ont. L. Rep. 637 (dissenting opinion), on the time of the taking effect of the execution of a power; *Loring v. Massachusetts Horticultural Co.* 171 Mass. 401, 50 N. E. 936, holding that where the appointment was by will to trustees, it took effect at the testator's death; *Re Vizard*, L. R. 1 Ch. 588, 35 L. J. Ch. N. S. 804, 12 Jur. N. S. 680, 14 Week. Rep. 1000; *Re Moses* [1902] 1 Ch. 100, 71 L. J. Ch. N. S. 101, 85 L. T. N. S. 596, 18 Times L. R. 147, holding that under an appointment made by will, the exercise of the power takes effect under the instrument creating the power, but it has no operation till the death of the testator.

Right of a married woman to make a proper will.

Cited in *Bradish v. Gibbs*, 3 Johns. Ch. 523, on the right of a feme covert to execute a power, by will, in favor of her husband; *Wagner v. Ellis*, 7 Pa. 411, 47 Am. Dec. 515, on the right of a married woman to devise her real estate under a power given or reserved to her.

Nature of instrument executing power of appointment by devise.

Cited in *Ocheltree v. McClung*, 7 W. Va. 232, on the nature of the instrument executing a power.

Distinction between powers and trusts.

Cited in *Lockwood v. Stradley*, 1 Del. Ch. 298, 12 Am. Dec. 97; *Emery v. Probate Judge*, 7 N. H. 142; *Withers v. Yeadon*, 1 Rich. Eq. 324,—on the distinction between powers and coupled with a trust; *Seitzinger v. Weaver*, 1 Rowle, 377, on the strict construction of powers.

Rights of tenants in common in property.

Cited in *Moseley v. Bolster*, 201 Mass. 135, 87 N. E. 606, to the point that land vested in children at death of testator as tenants in common could not be, among themselves, subject to variation except by their own acts.

Construction of written instruments.

Cited in *Lee v. Ellsberry*, 82 Ark. 209, 12 L.R.A.(N.S.) 956, 118 Am. St. Rep. 60, 101 S. W. 407, on the construction of a deed; *Maker v. Lazell*, 83 Me. 562, 23 Am. St. Rep. 795, 22 Atl. 474, holding that a grantor could not destroy his grant by words in other parts of his deed; *McMillan v. McMillan*, 30 Ont. Rep. 627, holding that where words are plain and sensible, no transposition can be made in order to create different meaning.

— Of a will.

Cited in *Van Wert v. Benedict*, 1 Bradf. 114, holding that wills made under a power are subject to the same rules as other wills; *Thompson v. Garwood*, 3 Whart. 287, 31 Am. Dec. 502, holding that wills executed under powers receive the same construction as proper wills; *Scoffin's Estate*, 15 Phila. 572, 39 Phila. Leg. Int. 272, holding that order in which various provisions of will are placed may be changed in construing it, if intention of testator can be better discovered in that way; *Ferry's Appeal*, 102 Pa. 207, 13 W. N. C. 348 (affirming 15 Phila. 572, 39 Phila. Leg. Int. 272), in the construction of a will to secure the intention of the testator; *Re Rispin*, 2 D. L. R. 644, holding that where by will securities were bequeathed to executor for benefit of named beneficiary, there is no power of disposition by will in such beneficiary of what remains in hands of

executor on death of beneficiary; *Ferguson v. Ferguson*, 2 Can. S. C. 497, holding that where rule of law, independent of and paramount to testator's intentions, defeats devise, proper course is to let property go as law directs in cases of intestacy.

Perpetuities and their value.

Cited in note in 21 E. R. C. 130, on perpetuities and their value.

21 E. R. C. 415, *ALEXANDER v. ALEXANDER*, 2 Ves. Sr. 640.

Exercise of power of appointment.

Cited in *Lawrence's Estate*, 136 Pa. 354, 11 L.R.A. 85, 20 Am. St. Rep. 925, 20 Atl. 521, holding that a general power of appointment gives a power to appoint in trust; *Appleton's Appeal*, 47 Phila. Leg. Int. 495, on sustaining of appointments in trusts, even under restricted powers; *Boyles's Estate*, 5 W. N. C. 363, holding that mere fact that trust is created affects validity of appointment, where such trust really effectuates intention of donor by confirming benefits to selected objects; *Thornton v. Bright*, 6 L. J. Ch. N. S. 121, 2 Myl. & C. 230, holding under a power of appointment to children in any manner the father should appoint, an appointment of the estate to trustees for the separate use of the daughter was valid.

Cited in 2 Washburn, Real Prop. 6th ed. 633, on time of execution of power; 2 Washburn, Real Prop. 6th ed. 632, on rule applicable to excessive execution of power; 1 Thomas, Estates, 1003, on what will defeat execution of power of appointment.

— Disposal to a class.

Cited in *Hawthorn v. Ulrich*, 207 Ill. 430, 69 N. E. 885, on the disposal of property under a power of appointment, amongst a class; *Beardsley v. Hotchkiss*, 30 Hun, 605, on the apportionment among a class of the property, under a power of appointment; *Neilson's Estate*, 17 W. N. C. 758, holding that a donee of a limited non-exclusive power must so appoint that every one of the objects will have a share; *Kemp v. Kemp*, 5 Ves. Jr. 849, 5 Revised Rep. 182, holding that under a power to appoint among several objects each must have a substantial share; *Clay v. Smallwood*, 100 Ky. 212, 38 S. W. 7, holding that when a power of appointment is to be exercised as to a class, although the shares under it need not be equal each one of the class is entitled to a substantial portion of the estate; *Den ex dem. Micheau v. Crawford*, 8 N. J. L. 90, holding that a power of disposal among children is not properly executed by giving all to one, or by excluding any; *Boyles's Estate*, 12 Phila. 83, 35 Phila. Leg. Int. 181, holding that a trust created in the exercise of a power is valid if such trust really effectuates the intention of the donor; *Bristow v. Warde*, 21 E. R. C. 356, 2 Ves. Jr. 336, 2 Revised Rep. 235, holding that an appointment to the husband of a daughter for life, and if she survived to her for life, and then to such as she should appoint, was a sufficient exercise of a power of appointment to children; *Bray v. Bree*, 2 Clark & F. 453, 8 Bligh, N. R. 568, on the right to appoint to one of a class; *Alloway v. Alloway*, 4 Drury & War. 380, 2 Connor & L. 517, holding that where the power is not a mere power of selection the donee may settle the fund among the children as she thought proper.

Unauthorized exercise of power.

Cited in *Thomas v. Joslin*, 30 Minn. 388, 15 N. W. 675, on the effect of excess of authority by agent; *Pepper's Estate*, 5 Pa. Co. Ct. 41, holding that power to appoint "to such of his children and issue, and for such estates and in such shares as he shall by last will appoint," is not well executed by gift by will to only son

for lives in being and 21 years thereafter, upon condition, etc.; *Ketchin v. Rion*, 68 S. C. 260, 47 S. E. 376, holding that an exercise of the appointment contrary to the power is void; *Tucker v. Gill*, 61 Ill. 236; *Mason v. Jones*, 13 Barb. 461; *Edgerly v. Barker*, 66 N. H. 434, 28 L.R.A. 328, 31 Atl. 900,—on the invalidity of the appointment in excess of power; *Ready v. Kearsley*, 14 Mich. 215, holding that if the donee in executing the power annexes some unauthorized conditions, the conditions in excess are void; *Lawrence's Estate*, 26 W. N. C. 537; *Gilpin Twp. v. Parke Twp.* 21 W. N. C. 269,—holding that where limitations and restrictions imposed upon estate by donee in his exercise of power are in excess of power, estate passes freed from such restrictions; *Robinson v. Harcastle*, 2 T. R. 241, 1 Revised Rep. 467, 2 Bro. Ch. 22, holding that where the exercise of the power was part bad and part good, that which is bad is void as in excess of power; *Root v. Stuyvesant*, 18 Wend. 257, holding a power to lease if made in excess of the power, avoids the excess only; *Thornton v. Zea*, 22 Tex. Civ. App. 509, 55 S. W. 798, holding that trustees can only have and exercise such power as is given them by the will, and if they attempt to annex unauthorized conditions, such attempt will be void; *Re Kerr*, L. R. 4 Ch. Div. 600, 46 L. J. Ch. N. S. 287, 36 L. T. N. S. 356, 25 Week. Rep. 390, holding that where a testator in exercise of a power of appointment to appoint a fund among her children gave one-half the property to a child, and the other half to another person as joint tenants the intention of the testator should be upheld to the extent of holding the exercise of the power of appointment valid as to the child's share and invalid as to the stranger's share.

Cited in note in 21 E. R. C. 431, on effect of cutting down previous absolute gift in subsequent part of instrument executing power.

—Conferring the whole estate upon one authorized to take.

Cited in *Rogerson v. Campbell*, 10 Ont. L. Rep. 748, holding that where a daughter had the power of appointment to dispose of it to the child or grandchildren of the testator, and she disposed of it to her husband, and in trust for one grandchild, the latter took it all free from any condition.

—Divisible or otherwise.

Cited in *Pepper's Appeal*, 120 Pa. 235, 6 Am. St. Rep. 702, 13 Atl. 929 (opinion of lower court) (affirming 21 W. N. C. 271, 5 Pa. Co. Ct. 41, 45 Phila. Leg. Int. 314), holding that conditions annexed to the estate in excess of the power given are void; *Roger's Estate*, 31 Pa. Super. Ct. 620, holding that where there is an excess of power, whether the excess renders the appointment wholly bad depends upon whether the good and the bad are separable; *Uhlendorf v. Kaufman*, 41 Ill. App. 373; *Com. v. Hawkins*, 83 Ky. 246,—holding that if a line can be drawn between that which is properly executed and the excess, the excess will be void; *Hillen v. Iselin*, 67 Hun. 444, 22 N. Y. Supp. 282, holding that where the power is imperfectly executed the excess, if separable, will be treated as void and the remainder enforced; *Hillen v. Iselin*, 144 N. Y. 365, 39 N. E. 368, holding that an execution of a power will not be defeated because of an excess which may be eliminated; *Re Perkins* [1893] 1 Ch. 283, 62 L. J. Ch. N. S. 531, 67 L. T. N. S. 743, 41 Week. Rep. 170, 3 Reports, 40, holding that where impossible to distinguish between authorized execution and excess the whole is bad.

Partial validity of lease for a longer period than allowed by law.

Cited in *Vancouver Lumber Co. v. Vancouver*, 15 B. C. 432, holding that lease by city for longer period than that permitted by order of council is valid for period for which it was authorized.

Intention of donor as governing appointment to a class.

Cited in *Keating v. Reynolds*, 1 Bay, 80, on resort to intention to construe limitations over to survivors of a class.

Delegation of a discretion to appoint.

Cited in *Belote v. White*, 2 Head, 703, holding that a discretion to appoint under a power can not be delegated to another; *Berger v. Duff*, 4 Johns. Ch. 368, holding that a power to sell land by executors can not be executed by their attorneys.

Cited in *Reinhard*, Ag. 145, on lack of power to delegate delegated authority.

Delegation of discretionary powers of trustees.

Cited in *Pennsylvania Co. v. McMurtrie*, 3 Phila. Leg. Int. 77, holding that one trustee cannot delegate his discretion to another person; *Bohlen's Estate*, 75 Pa. 304 (affirming 9 Phila. 529, 29 Phila. Leg. Int. 108), holding that a trustee can not delegate his discretion to another; *Dodge v. Stickney*, 62 N. H. 330, on the delegation of the powers of a trustee; *Saunders v. Webber*, 39 Cal. 287, holding that the discretionary powers of a trustee are not assignable; *Wilson v. Pennoek*, 27 Pa. 238; *Mercer County v. Pittsburg & E. R. Co.* 27 Pa. 389,—holding that discretionary powers given to trustees will not pass to others; *Gambell v. Trippe*, 75 Md. 252, 15 L.R.A. 235, 32 Am. St. Rep. 388, 23 Atl. 461; *Andrew v. New York Bible & Prayerbook Soc.* 4 Sandf. 156,—holding that a trust involving personal confidence can not be transferred.

Cited in 2 Beach, Trusts, 1244, on liability of trustee in delegation of powers and duties; 2 Beach, Trusts, 996, 1005, on discretionary powers of trustees; 2 Beach, Trusts, 1341, on right of trustee to employ persons to collect debts due trust estate; 1 Devlin, Deeds, 3d ed. 758, on invalidity of delegation of power of sale by one executor to co-executor; 2 Beach, Trusts, 1089, on power of sale in surviving trustee.

Distinguished in *Grinnell v. Buchanan*, 1 Daly, 538, holding that a ministerial power may be delegated.

Property to be disposed of as subject to the debts of the person appointing.

Cited in *Wakefield v. Campbell*, 20 Me. 393, 37 Am. Dec. 60, holding that no power can be so framed as to protect an appointment under it from the debts of the person appointing.

Word children as including grandchildren.

Cited in *Bernard v. Hipkins*, 6 Call. (Va.) 101, on the word children as including grandchildren.

Distinguished in *Lazier v. Robertson*, 30 Ont. Rep. 517, holding that in a marriage settlement the word children may include grand children where there is a vested remainder to the children; *Haydon v. Wilshere*, 3 T. R. 372, holding that under a bond by the father, upon the daughter's marriage to the husband a certain sum or to the husband's executors after death if any issue of the marriage should be living, the grandchildren were issue.

Effect on gift of remoteness of interest.

Cited in *Gray*, Perpet. 2d ed. 229, on effect on gift of limitation of interests being too remote; *Grey*, Perpet. 2d ed. 352, on invalidity of gift to issue for remoteness.

21 E. R. C. 425, *CARVER v. BOWLES*, 9 L. J. Ch. N. S. 91, 2 Russ. & M. 304, 34 Revised Rep. 102.

Valid appointment as affected by attempted restriction ultra vires.

Cited in *Simonson v. Waller*, 9 App. Div. 503, 41 N. Y. Supp. 662, on the

absolute gift prevailing, where specific particular interest created out of it fail: *Philadelphia v. Girard*, 45 Pa. 9, 84 Am. Dec. 470, on the vested estate as being unaffected by unlawful conditions, limitations, powers, trusts, or restraints which are annexed to it; *Re Edwards*, 22 Ont. L. Rep. 367, holding that under will attempting to dispose of proceeds of insurance policy on testator's life which was payable to wife, by giving wife life use only, wife was entitled to insurance money absolutely as well as to other benefits under will; *Lassence v. Tierney*, 1 Macn. & G. 551, 2 Hall & Tiv. 115, 14 Jur. 182, on the restriction of an absolute legacy, as not prevailing over the absolute gift; *Kampf v. Jones*, 7 L. J. Ch. N. S. 63, 2 Keen, 756, holding that where the testatrix having a power of appointment to her children or remoter issue, appointed a sum to one of them absolutely, and then attempted to limit it over to the unborn children of such child, the prior absolute gift to the child was good; *Harvey v. Stracey*, 2 L. J. Ch. N. S. 23, 1 Drew. 73, 16 Jur. 771, holding that under a prior clause of definite and precise appointment of shares to each niece living at death of testatrix's husband, the niece took absolute an interest subject to the trust to her use, even though there was an unsuccessful attempt to settle such shares; *Wooldridge v. Wooldridge*, 28 L. J. Ch. N. S. 689, Johns. 63, 5 Jur. N. S. 566, holding that where there is an absolute appointment by will to a proper object of the power, and a following attempt to modify the interests so appointed in a manner which the law will not allow the court reads the will, as if the passages in which the attempts were made, were left out; *Dowglass v. Waddell, Jr.* L. R. 17 Eq. 384, holding that where there is a complete and absolute appointment to all the children, and afterwards an attempt to cut this down and settle it on others which would be void as an appointment, the qualifying trust is void and the original appointment stands without the modification; *McDonald v. McDonald*, L. R. 2 H. L. S. C. App. Cas. 482, holding where a gift made under a power is accompanied by directions and conditions *ultra vires*, the gift will be valid and the directions void; *Cooke v. Cooke*, L. R. 38 Ch. Div. 202, 59 L. T. N. S. 693, 36 Week. Rep. 756, on an absolute appointment as prevailing over an attempt to modify the enjoyment beyond the power; *Warrend v. Warrand* [1901] 3 Fraser, 369 (Scot. Sess. Cas. 5th series 369), holding that under a power of appointment, the exercise of it which appointed the estate to the children, under conditions and restrictions limiting it to them for life only, was valid.

Cited in note in 10 Eng. Rul. Cas. 321-323, on necessity of devisee who accepts devise relinquishing all claims to estate devised to another.

Distinguished in *Re Crawshay*, L. R. 43 Ch. Div. 615, 59 L. J. Ch. N. S. 395, 62 L. T. N. S. 489, 38 Week. Rep. 600, holding that where the appointment was first absolute and then it was limited to be in trust, which was invalid, the later clause that if the appointment in trust was invalid that the share should go to another, the share would go to such other person.

Election raised by appointment to proper persons with a limitation to persons not objects.

Cited in *Black v. Lamb*, 21 L. J. Ch. N. S. 46, 14 Beav. 482, 16 Jur. 142, holding that where there was an appointment in favor of the objects of the power, absolutely and also a bequest of the testator's own property, requesting them to leave the appointed fund to persons not objects of the power, no case of election arose; *Churchill v. Churchill*, L. R. 5 Eq. 44, 16 Week. Rep. 192, holding that where there was an appointment to objects of power with superadded restriction in excess of power, coupled with a gift of other property to the appointee, no case of election arose; *Wollaston v. King*, L. R. 8 Eq. 165, 38 L. J. Ch. N. S.

392, 20 L. T. N. S. 1003, 17 Week. Rep. 641, holding that a case of election was not raised by an appointment to the daughters and benefits out of the testator's own estate; *Bate v. Willats*, 37 L. T. N. S. 221, holding that an appointment of trustees for his son who was an object of the power, or in case he did not survive then to others not objects of the power, and other benefits out of the testator's own estate which were given to the son, who did survive, did not raise a case of election.

Distinguished in *Moriarty v. Martin*, 3 Ir. Ch. Rep. 26, holding that where there was a power of appointment to children, and the donee appointed £1 to be paid to each of his two children, and the residue to go to one of them for life and then to such as he may appoint and also gave him other property, a case of election arose; *Tompkins v. Blane*, 28 Beav. 422, holding that where there was an appointment to a son and daughter under a power to appoint among children or their issue, in equal shares to vest as afterward described, and a bequest of the residuary estate to the son in trust to vest absolutely later, subject to a settlement therein directed, with gifts over to persons not objects of the trust, it raised a case of election; *White v. White*, L. R. 22 Ch. Div. 555, 52 L. J. Ch. N. S. 232, 48 L. T. N. S. 151, 13 Week. Rep. 451, holding that an appointment to an object of the power, subject to a charge in favor of others who were not, so as to equalize the shares of all, gave rise to a case of an election in favor of those who were not objects.

Ademption of a legacy.

Referred to as a leading case in *Hine v. Hine*, 39 Barb. 507, holding that when a person in loco parentis, or a parent bequeaths a legacy to a child or grandchild, and^d during his life time gives a portion to the same child, such portion will in general be deemed an ademption of the legacy.

Cited in note in 38 L.R.A.(N.S.) 592, on gift by testator as ademption of general legacy to donee.

Cited in *Smith*, Pers. Prop. 248, on ademption.

Distinguished in *De Groff v. Terpenning*, 14 Hun. 301, holding that a gift to the daughter of the amount of the legacy was not an ademption where the legacy was contingent.

21 E. R. C. 432, *DOE EX DEM. BLOOMFIELD v. EYRE*, 5 C. B. 713, 18 L. J. C. P. N. S. 284.

Validity of a condition subsequent in an absolute gift.

Cited in *Dusenberry v. Johnson*, 59 N. J. Eq. 336, 45 Atl. 103, holding that under will creating trust, to pay income to grandchildren until 21 years of age, when they were to be paid principal, and if one died before majority other was to receive whole, if both died it to be paid to their father, legacy vested in grandchildren on testator's death subject to be divested in case of their death before majority; *Leonard v. Leonard*, 1 N. B. Eq. 576, holding that a bequest to the wife in lieu of dower, upon the condition that if she married again, such property to go to trustees in trust for certain sons was not void; *Re Archer*, 14 Ont. L. Rep. 374, holding that provision for divesting in will, is not rendered of no avail by fact that gift over is void by statute of Mortmain, though that gift be for all purposes void; *Walsh v. Fleming*, 10 Ont. L. Rep. 226, holding that under will devising to son use of certain land for life, if he returned home, and at his death to be divided between son's children: upon son's return and death without children devise lapsed; *Hurst v. Hurst*, L. R. 21 Ch. Div. 278, 51 L. J. Ch. N. S. 729, 46 L. T. N. S. 899, 31 Week. Rep. 327, holding that where property was

given in trust for another for life, remainder to the children, but with condition that if the lessee, charged the estate in any way, his rights to be immediately forfeited and the remainder to take immediate effect, the condition was good even though there were no children.

Cited in *Gray, Perpet.* 2d ed. 560, 561, 563, on validity of determinable fees; *Gray, Perpet.* 2d ed. 59, on possibility of determinable fee with possibility of reverter in a limitation of copyholds.

Distinguished in *Jones v. Davies*, 28 Week. Rep. 455, holding that where a father bequeathed his property equally to two sons and a daughter absolutely, but that if the daughter should die without issue her share to go to the sons or the survivor of them that her property vested indefeasibly in her upon her surviving both sons although she died without issue.

21 E. R. C. 445, *CROMPE v. BARROW*, 4 Ves. Jr. 681, 4 Revised Rep. 318.

Validity of exercise of power of appointment.

Cited in *Boyle's Estate*, 12 Phila. 83, 35 Phila. Leg. Int. 181, 5 W. N. C. 363, holding that the fact that a trust is created in the exercise of a power to appoint among children for such estate or estates as the donee shall direct by will, does not affect the validity of the appointment if the donor's intention is effectuated; *Lawrence's Estate*, 136 Pa. 354, 11 L.R.A. 85, 20 Am. St. Rep. 925, 26 W. N. C. 537, 20 Atl. 521, 47 Phila. Leg. Int. 495, holding that under a general power of appointment authorizing the donee to grant the real estate in fee to such as he may by will direct, in such shares as he desires, an appointment in fee to trustees for persons for life remainder over in fee is valid unless void for remoteness; *Thornton v. Bright*, 2 Myl. & C. 230, 6 L. J. Ch. N. S. 121, holding that an appointment of the estate to trustees for the separate use of the daughter during the joint lives of herself and husband was a valid exercise of the power of the father to appoint among his children such shares, and proportions and upon such conditions as he determined; *Williamson v. Farwell*, L. R. 35 Ch. Div. 128, 56 L. J. Ch. N. S. 645, 56 L. T. N. S. 824, 36 Week. Rep. 37, holding that the appointment by the donee to his son for life with remainder to such of the son's children as he should appoint, or in default of the appointment to the son in fee, gave the son a fee, upon the failure to exercise the appointment by the son.

Cited in *Gray, Perpet.* 2d ed. 300, on separable limitations.

—Invalidity of excess.

Cited in *Warrand v. Warrand* [1901] 3 Fraser, 369, holding that under a power to appoint under conditions and restrictions, and an appointment to the children for them to receive the rents for life, and the capital to go to their issue, or if any died without issue to go to such as such child should appoint the restriction of a life rent to the children was invalid and that the children were entitled to the share appointed to them in fee.

Cited in 2 Washburn, *Real Prop.* 6th ed. 631, on rule applicable to excessive execution of power.

—Invalidity of one of alternative gifts.

Cited in *Schettler v. Smith*, 41 N. Y. 328; *Cowen v. Rinaldo*, 8 Misc. 115, 28 N. Y. Supp. 369,—holding that where a limitation is made to take effect on two alternative events one of which is too remote and the other valid as within the prescribed limits, the gift will be valid and take effect on the happening of the valid event.

— Partial invalidity as affecting remainder.

Cited in *Fowler v. Depau*, 26 Barb. 224, on the effect of a partial invalidity of a gift because of remoteness, upon the remainder of the gift.

Delegation of power.

Cited in 1 Beach, Trusts, 640, on trust arising from delegation of powers by trustee.

Construction of will.

Cited in *Williamson's Estate*, 3 Pa. Co. Ct. 239, holding that fact that provision in will would be too remote if construed in certain way is reason for supposing that it was not intended to be construed in that way; *Coggins's Appeal*, 124 Pa. 10, 10 Am. St. Rep. 565, 16 Atl. 579, 23 W. N. C. 206 (affirming 3 Pa. Co. Ct. 239, 44 Phila. Leg. Int. 176), on the construction of the will according to circumstances existing at the testator's death.

21 E. R. C. 452, *BRUDENELL v. ELWES*, 7 Ves. Jr. 382, 6 Revised Rep. 310, opinion of law judges certified to the Lord Chancellor in 1 East, 442.

Excess of power as affecting validity of appointment.

Cited in *Lawrence's Estate*, 136 Pa. 354, 11 L.R.A. 85, 20 Am. St. Rep. 925, 26 W. N. C. 537, 20 Atl. 521, holding that where the donee of a power to devise was in being at the time the power was created, and appoints by will in trust for life-tenants to take at his death, with remainder over, the appointment is valid even though the remainder over be too remote.

Rule against perpetuities.

Cited in *Madison v. Larmon*, 170 Ill. 65, 62 Am. St. Rep. 356, 48 N. E. 556, holding that a devise to seventeen persons for life, with remainders to six for life and in fee, all of which will vest within twenty one years after the death of a person alive at the testator's death is valid; *Jackson ex dem. Nicoll v. Brown*, 13 Wend. 437, on the validity of a devise for life to an unborn person.

Cited in note in 21 Eng. Rul. Cas. 135, on perpetuities and their value.

Cited in *Gray, Perpet.* 2d ed. 172, on validity of successive gifts to persons unborn provided their estates vest within the required limit; 2 Washburn, Real Prop. 6th ed. 544, as to what limitations are too remote.

Distinguished in *Brown v. Brown*, 86 Tenn. 277, 6 S. W. 869, holding that when the contingency upon which the bequest over is to take effect, must by the terms of the will happen within lives in being and twenty-one years thereafter, the limitation over is valid although the result may be that an unborn child of an unborn child takes thereunder.

Power of revocation of appointment.

Cited in *Re Harding* [1894] 3 Ch. 315, 63 L. J. Ch. N. S. 725, 7 Reports, 414, 71 L. T. N. S. 269, 42 Week. Rep. 677, holding that where by a marriage settlement power to appoint was reserved to the husband and wife, with power of revocation and new appointment, a joint deed reserving the power of revocation and new appointment mentioned in the deed, effectually reserved the power of revocation.

Construction of powers.

Cited in *Holmesdale v. West*, L. R. 3 Eq. 474, 36 L. J. Ch. N. S. 253, on the strict construction of a marriage settlement; *Eastwood v. Avison*, L. R. 4 Exch. 141, 38 L. J. Exch. N. S. 74, on the power to appoint to children as giving power to leave to grandchildren.

Doctrine of cy pres.

Cited in *Jackson v. Phillips*, 14 Allen, 539, on the doctrine of cy pres, as applied to executory devises or powers of appointment; *Edgerly v. Barker*, 66 N. H. 434, 28 L.R.A. 328, 31 Atl. 900, on the doctrine of cy pres, in the construction of wills; *Re Mortimer* [1905] 2 Ch. 502, 74 L. J. Ch. N. S. 745, 93 L. T. N. S. 459, on the application of the doctrine of cy pres.

Disapproved in *White v. Fisk*, 22 Conn. 31, holding that the doctrine of cy pres has never been adopted into the laws of Connecticut.

Effect of misstating name of lessor of property.

Cited in *Doe ex dem. Presbyterian Church v. Bain*, 3 U. C. Q. B. 198, on effect of misstating name of lessor in ejectment to try title of church lands.

21 E. R. C. 465, *JONES v. WINWOOD*, 5 Jur. 190, 10 L. J. Ch. N. S. 165, 10 Sim. 150, affirming the decision of the Barons of the Exchequer reported in 3 Mees. & W. 653.

Power of life tenant to consent to sale of the estate.

Cited in *Leggett v. Doremus*, 25 N. J. Eq. 122, holding that the power to consent to a sale is not extinguished in all cases where the donee of the power is the life tenant, even by the absolute alienation of his life estate; *Re Beddingfield* [1893] 2 Ch. 332, 62 L. J. Ch. N. S. 430, 3 Reports, 483, 68 L. T. N. S. 634, 41 Week. Rep. 413, holding that where a settlement of real estate contained a power of sale by the trustees with the consent of the life tenant, and the life tenant incumbered the estate and was declared bankrupt, the trustees could still with the consent of the life tenant sell the land, but the trustee in bankruptcy and the incumbrancer must join.

Cited in 1 *Devlin Deeds*, 3d ed. 774, on necessity that assignee join with insolvent life tenant in assenting to sale.

21 E. R. C. 476, *CHAMBERS v. SMITH*, L. R. 3 App. Cas. 795.

Right of creditors to reach trust estate.

Cited in *Baker v. Brown*, 146 Mass. 369, 15 N. E. 783, holding that where the widow left the residue of her estate to two daughters, subject to the condition that they support their father for life, the husband had no interest which was subject to his debts.

Cited in *Smith*, Eq. Rem. 42, on right of creditor to maintain bill to reach trust property which by will has been rendered inalienable and not subject to creditors.

— Validity of trust withholding property from liability for debts.

Cited in *Ballantine v. Ballantine*, 152 Fed. 775, holding that a provision withholding payment of a legacy at the discretion of the trustee was valid; *Seymour v. McAvoy*, 121 Cal. 438, 41 L.R.A. 544, 53 Pac. 946, on the validity of a spendthrift trust.

— Power of court to control discretion of trustees.

Cited in *Stone v. Westcott*, 18 R. I. 685, 29 Atl. 838, on the power of a Court of Equity to control the discretion of trustees.

Cited in note in 25 L.R.A.(N.S.) 423, on right to control discretion vested in one person to determine whether or when another is fit to receive legacy or devise.

Validity of declaration inserted in testing clause of deed.

Cited in *Blair v. Assets Co.* [1896] A. C. 409, on the validity of the declaration asserted in the testing clause of the deed.

21 E. R. C. 499. *WHITE v. ST. BARBE*, 1 Ves. & B. 399, 12 Revised Rep. 246.

Appointment of grandchildren under power to appoint to children.

Cited in *Re Pocock*, L. R. 6 Ch. 445, 40 L. J. Ch. N. S. 681, 25 L. T. N. S. 233, 19 Week. Rep. 801, holding that an appointment to trustees for the benefit of the daughter for life, to her husband for life, with remainder to issue, was a valid exercise of power to appoint to children: *Cuninghame v. Anstruther*, 21 E. R. C. 512, L. R. 2 H. L. Sc. App. Cas. 223, holding that an appointment to the children and grandchildren was valid.

Distinguished in *Morgan v. Gronow*, L. R. 16 Eq. 1, 42 L. J. Ch. N. S. 410, 28 L. T. N. S. 434, holding that an appointment to trustees to take effect after the marriage of a daughter then unmarried, as she should by deed or will appoint, meanwhile upon trust for her for life, and after her death to such as she should appoint, was void for remoteness.

Husband's power to dispose of wife's property in expectancy.

Cited in *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85, on the consent to disposal of chose in action of the wife as barring her right of survivorship: *Siter's Accounts*, 4 Rawle, 468, on the power of the husband to dispose of choses in action of the wife.

Distinguished in *Matheney v. Guess*, 2 Hill, Eq. 63, holding that the husband, under the statute could not acquire absolute right to the wife's chose in action after her death by administration, but only to his distributive share.

Invalidity for remoteness of appointment under power.

Cited in *Gray*, Perpet. 2d ed. 414, on invalidity for remoteness of appointment under power.

21 E. R. C. 505. *WHISTLER v. WEBSTER*, 2 Revised Rep. 260, 2 Ves. Jr. 367.

See s. c. 10 E. R. C. 316.

21 E. R. C. 506. *M'QUEEN v. FARQUHAR*, 8 Revised Rep. 212, 11 Ves. Jr. 467.

Exercise or release of power for donee's benefit.

Cited in *Thomson v. Norris*, 20 N. J. Eq. 489, holding that donee of power cannot release it, without consent of all appointees, for consideration of benefit to himself; *Shank v. Dewitt*, 44 Ohio St. 237, 6 N. E. 255, holding that an appointment so as to secure to the donee a substantial pecuniary benefit is void: *Haynesworth v. Cox*, Harp. Eq. 117, holding that where a power of electing is given to a trustee as to the rights of a third person the trustee is bound to exercise it most beneficially for the cestui que use; *Re Huish*, L. R. 10 Eq. 5, 39 L. J. Ch. N. S. 499, 22 L. T. N. S. 565, 18 Week. Rep. 817, holding that an appointment with the object that the appointor may obtain an exclusive advantage is bad, but not if he merely shares in it to some extent, where benefits are secured for all the objects of the power; *Henty v. Wrey*, L. R. 19 Ch. Div. 492, L. R. 21 Ch. Div. 332, 47 L. T. N. S. 231, 53 L. J. Ch. N. S. 674, 30 Week. Rep. 850, on the validity of an appointment in fraud of the power for donee's benefit.

Power to sell land as authorizing partition or mortgage.

Cited in *Wilson v. Troup*, 7 Johns. Ch. 25, on the power to sell as authorizing partition of land: *Gosselin v. Chicago*, 103 Ill. 623, holding that a power to sell does not authorize an agent to make a partition: *Carr's Petition*, 16 R. I. 645, 27 Am. St. Rep. 773, 19 Atl. 145, holding that a testamentary power of sale does not give power to make partition: *Iverson v. Saulsbury*, 68 Ga. 790, on same point.

Cited in 1 Devlin, Deeds, 3d ed. 760, on what is authorized by power of sale.

Distinguished in *Van Arsdale v. Drake*, 2 Barb. 599, holding that where parties are seized of a life estate by virtue of an assignment to them by one of the tenants in common, in trust for the benefit of creditors, they have an absolute right under the statute to a decree of partition.

— Power to exchange.

Cited in *Phelps v. Harris*, 101 U. S. 370, 25 L. ed. 855, holding that a power to sell and exchange includes power to partition; *Phelps v. Harris*, 51 Miss. 789, holding that a power to exchange is well executed by a partition; *Re Barwick*, 5 Ont. Rep. 710, holding that a power to sell includes a power to exchange; *Smith v. Spears*, 22 Ont. Rep. 286, holding that mortgagee with power to sell, under Mortgage Act can exercise power by way of exchange for other land; *Re Frith*, L. R. 3 Ch. Div. 618, 45 L. J. Ch. N. S. 780, 35 L. T. N. S. 146, 24 Week. Rep. 1061, holding that a power to exchange lands is properly executed by partition.

Grantee with notice, from bona fide purchaser.

Cited in *Ashcraft v. DeArmond*, 44 Iowa, 229; *Holmes v. Stout*, 4 N. J. Eq. 492,—holding that a grantee of a bona fide purchaser without notice, is not to be charged with the incumbrance or fraud although known to such grantee before he acquired title.

Cited in 2 Devlin, Deeds, 3d ed. 1380, on good title of purchaser with notice from bona fide purchaser.

Specific performance.

Cited in *Van Blarcom v. Hopkins*, 63 N. J. Eq. 466, 52 Atl. 147, holding that a purchaser would be required to specifically perform his contract, with a reduction in the purchase price, where the lot purchased was five feet shorter than advertised, all other circumstances being equal; *Canada Life Assur. Co. v. Peel General Mfg. Co.* 26 Grant, Ch. U. C. 477, holding that in absence of fraud on part of trading company deficiency in number of shares of stock sold is not bar to specific performance of contract as to number of shares ready for delivery.

Cited in *Pomeroy, Spec. Perf.* 2d ed. 517, on right to specific performance where vendor is the actor, demanding a partial specific performance or a specific performance with compensation; *Pomeroy, Spec. Perf.* 2d ed. 421, on refusal of specific performance where vendor's title is defective; *Pomeroy, Spec. Perf.* 2d ed. 520, on vendor's right to specific performance when title to a material part of the land fails; *Pomeroy, Spec. Perf.* 2d ed. 288, on nature and extent of doubt as to title which will render contract unenforceable.

Presumption as to validity of properly executed instrument.

Cited in *Butler v. Benson*, 1 Barb. 526, on the presumption as to the validity of a written instrument properly executed, sealed and attested.

21 E. R. C. 512, *CUNINGHAME v. ANSTRUTHER*, L. R. 2 H. L. Sc. App. Cas. 223.

Piecemeal appointments.

Cited in *Crooke v. Kings County*, 97 N. Y. 421, holding that the donee could convey one interest at one time and another at a subsequent time, until she had conveyed the fee; *McGibbon v. Abbott*, L. R. 10 App. Cas. 653, 54 L. J. P. C. N. S. 39, 54 L. T. N. S. 138, on the donee being bound to execute the power once for all.

Validity of family arrangement.

Cited in 2 Cooley, Torts, 3d ed. 981, on validity of family arrangements not unfairly brought about.

21 E. R. C. 535, *ELLIOT v. MERRYMAN*, Barnard. Ch. 78.

Rights of purchaser of land from executor.

Cited in *Shelmerdine v. Linton*, 16 Phila. 171, 40 Phila. Leg. Int. 286, holding that purchaser from execution to pay individual debt of executor, is responsible to person injured.

Duty of purchaser from executor or trustee to sell land to see that money is properly applied.

Cited in *Garnett v. Macon*, 2 Brock. 185, Fed. Cas. No. 5,245; *Bower v. Hadden Blue Stone Co.* 30 N. J. Eq. 171; *Garnett v. Macon*, 6 Call (Va.) 308; *Redford v. Clarke*, 106 Va. 115, 40 S. E. 630; *Grider v. Driver*, 46 Ark. 109,—holding that purchaser from trustee, who knows that trustee is committing breach of trust in making sale is bound to see to application of purchase money; *Newman v. Samuels*, 17 Iowa, 528, holding that purchaser from trustee who holds title under absolute conveyance with power to raise fund for specific purpose must see to it that fund is duly applied; *Van Bokkelen v. Tinges*, 58 Md. 53; *Keister v. Scott*, 61 Md. 507; *Ludlow v. Flournoy*, 34 Ark. 451,—holding that in absence of fraud executor's receipt for purchase money is sufficient protection to purchaser, where executor has power of sale; *Brooks v. Eskins*, 24 Mo. App. 296, holding that under statute where by will lien is affixed to land to secure payment of legacy, lien follows land into hands of purchaser with notice; *Grode v. Van Valen*, 25 N. J. Eq. 95, holding that land charged with payment of legacies and interest thereon, when charge was intended to be continuing, cannot be relieved from such charge by payment by devisee of full amount of legacies to executors; *Budd v. Wilson*, 61 N. J. Eq. 246, 48 Atl. 225, holding that under will giving power of sale and to make perfect title to purchaser, without liability to see to application of purchase money land was charged with payment of legacies; *McCartney's Estate*, 18 Phila. 35, 43 Phila. Leg. Int. 98, 18 W. N. C. 51, holding that purchaser will be relieved from duty of seeing to application of purchase money where sale is to pay debts, or legacies, and also where land being charged with debts sale is for legacies only; *Spear v. Hannum*, 1 Yeates, 380, holding that where executor sells lands under proper power creditors cannot take such land in execution; *National Bank v. Smith*, 17 R. I. 244, 21 Atl. 959, holding that where power is given to trustees to sell trust estate for purposes of trust generally, purchaser is not bound to see to application of purchase money; *Rhame v. Lewis*, 13 Rich. Eq. 269, holding that fraud will be presumed in equity, whenever purchaser knows, that property belongs to estate, and that executor intends to apply proceeds to his own use; *Loughmiller v. Harris*, 2 Heisk. 553, holding that purchaser from trustee to sell land mortgaged for payment of debts, is not bound to see to application of purchase money; *Yancy v. Batte*, 48 Tex. 46 (dissenting opinion), on duty of purchaser from trustee to see to application of purchase money; *Claiborne v. Holland*, 88 Va. 1046, 14 S. E. 915, holding that when trustee has power to sell with consent of life tenants and did so sell, purchaser is not bound to see to application of purchase money; *Woodwine v. Woodrum*, 19 W. Va. 67, holding that when interval must elapse between sale and payment out of purchase money, purchaser is not bound to see to application of purchase money by a trustee.

Cited in note in 5 L.R.A.(N.S.) 370, on testamentary trusts to pay debts.

—To see that terms of trust are fulfilled.

Cited in *Owings's Case*, 1 Bland, Ch. 290, holding that charge of annual sum upon lands for support of lunatic, is incumbrance following estate, which may be enforced either against person or personal property of holder or by putting

receiver upon estate: *Whitfield v. Burke*, 86 Miss. 435, 109 Am. St. Rep. 714, 38 So. 550, 4 Ann. Cas. 370, holding that where by deed or will tenant for life has power to sell lands for reinvestment of proceeds, bona fide purchaser is not bound to see to reinvestment; *Nicholls v. Peak*, 12 N. J. Eq. 69, holding that bona fide purchaser of land from trustee with power to sell, was not bound to see to application of purchase money directed by trust instrument; *Cardwell v. Cheatham*, 2 Head, *14, holding that it is duty of both trustee and purchaser, in event property is sold, to see that fund is paid over to trustee and reinvested for benefit of wife as directed by terms of trust.

Devise charging debts as affecting subsequent purchaser.

Cited in *Gardner v. Gardner*, 3 Mason, 178, Fed. Cas. No. 5,227; *Clark v. Hornthal*, 47 Miss. 434; *White v. Kane*, 7 N. Y. Civ. Proc. Rep. 267; *White v. Kane*, 19 Jones & S. 295.—holding that where land is devised charged generally with testator's debts, bona fide purchaser after three years from testator's death will take good title, discharged from debts; *Turner v. Turner*, 57 Miss. 775, holding that land sold by devisee and executor in pursuance of power contained in will "to obtain money to pay legacies," etc., is not subject in hands of vendee to charge for legacies; *Dewey v. Ruggles*, 25 N. J. Eq. 35, holding that executors' deed will pass both legal and equitable estate, where will charged payment of debts and funeral expenses upon all estate both real and personal; *McCartney's Estate*, 2 Pa. Co. Ct. 202, holding that purchaser at executor's sale of land under power, is under no obligation to see to application of purchase money, where land is charged with payment of debts; *Yost v. Adams*, 13 Ont. App. Rep. 129, holding that executors could make good title to purchasers of land not specified in will, under general direction to pay debts, etc.; *McMillan v. McMillan*, 21 Grant, Ch. (U. C.) 594, holding that where lands are devised subject to the payment of annuities those lands will be charged in the hands of a purchaser, but not where there is also a charge of debts.

Cited in note in 32 L.R.A.(N.S.) 686, on implied power of executor or trustee to sell realty.

Non-necessity that purchaser of community property sold to pay debts see that proceeds are properly applied.

Cited in *Sanger v. Moody*, 60 Tex. 96, holding that purchaser of community property from the survivor to pay community debts is not bound to see to application of purchase money.

Rights of surety against principal.

Cited in *Wharton v. Clements*, 3 Del. Ch. 209, on the rights of a surety against his principal.

Rights of one acting in fiduciary capacity dealing with property.

Cited in *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242, holding that agent who uses information he has obtained in course of his agency as means of buying for himself, will be compelled to convert to principal; *Shaw v. Spencer*, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107; *Prall v. Tilt*, 28 N. J. Eq. 479,—holding that person holding stock in fiduciary capacity has, prima facie, no right to pledge it to secure debt growing out of independent transaction unconnected with trust.

Rights of purchaser of legal title without notice of equitable rights of other.

Cited in *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510, holding that bona fide purchaser of land of partnership, legal title of which is vested in

copartners without notice of equitable rights of others will be protected in his title.

Rights of purchaser from or assignee of insolvent debtor.

Cited in *Hiner v. Hawkins*, 59 Ark. 303, holding that purchaser from insolvent debtor for adequate consideration is not bound to see to application of purchase money; *Abraham v. Abraham*, 19 Ont. Rep. 256, holding that plaintiff in judgment for alimony, registered before assignment by defendant is not obliged to rank with other creditors of defendant.

21 E. R. C. 540, RE *TANQUERAY-WILLAUME*, L. R. 20 Ch. Div. 465, 51 L. J. Ch. N. S. 434, 46 L. T. N. S. 542, 30 Week. Rep. 801, reversing the decision of *Kay, J.*, reported in 45 L. T. N. S. 281.

Direction to pay debts, as charging estate therewith.

Cited in *Bergman v. Bogda*, 46 Ill. App. 351, holding that where an executor is directed to pay debts and real estate is devised to him, either personally or as executor, the land so devised is charged; *Fletcher v. American Trust & Bkg. Co.*, 111 Ga. 300, 78 Am. St. Rep. 164, 36 S. E. 767, holding that under a will giving executor authority to raise money to pay debts, he is authorized to borrow money and if he does the lender is not bound to inquire if there are any debts, or how many; *Re Moore & Confederation Life Asso.* 9 Manitoba L. Rep. 453, on the implied power of sale where debts and legacies are charged on land, devised to others than executors; *London & C. Loan & Agency Co. v. Wallace*, 8 Ont. Rep. 539, holding that where trustees were empowered to pay debts person loaning money on mortgage of lands executed by trustees is entitled to enforce mortgage; *Yost v. Adams*, 8 Ont. Rep. 411, holding that where the testator made his debts a charge on his estate, but failed to enumerate all the lands, that the executors could sell those lands free from debts for the purpose of paying debts; *Marshall v. Gingell*, L. R. 21 Ch. Div. 790, 51 L. J. Ch. N. S. 818, 47 L. T. N. S. 859, 31 Week. Rep. 63, on the direction of the trustees or executors to pay debts as charging the same on land devised to the former; *Re De Burgh Lawson*, L. R. 41 Ch. Div. 561, 58 L. J. Ch. N. S. 561, 37 Week. Rep. 797, holding that where a married woman was entitled to the income of a certain estate, for life, with the power of appointment, and she by her will directed her executor to pay her debts, and then devised this land under the power of appointment, the land was charged with her debts.

—After unreasonable time.

Cited in *Re Molyneux, Jr.* L. R. 15 Eq. 383, holding that where the testator made no specific disposition of a long leasehold, and thirty seven years after his death, it was put up for sale by his executors under a direction to pay debts, the object that the power to sell was gone, was valid; *Re Ryan, Jr.* L. R. 17 Eq. 42, holding that where the two trustees and another were named as executors, and only one of them proved the will, that under the direction to pay debts, he had the power to sell the lands, if done within a reasonable time after the testator's death.

Distinguished in *Re Whistler*, L. R. 35 Ch. Div. 561, 56 L. J. Ch. N. S. 827, 57 L. T. N. S. 77, 35 Week. Rep. 662, 51 J. P. 820; *Re Venn* [1894] 2 Ch. 101, 63 L. J. Ch. N. S. 303, 8 Reports, 220, 70 L. T. N. S. 312, 42 Week. Rep. 440,—holding that in case of the sale of leaseholds to pay the debts, the fact that they were sold more than twenty years after the testator's death, is not prima facie evidence that the executor's authority to sell is gone; *Re Verrell* [1903] 1 Ch. 65, 72 L. J. Ch. N. S. 44, 87 L. T. N. S. 521, 51 Week. Rep. 73, holding that

where the widow was the executor and had power to sell for debts. but was requested not to sell any of the leaseholds, and she did make a contract for the sale of one of them, eighteen years after the testator's death, the purchaser being told that there were no debts, he was not bound to complete the contract.

—Duty of purchaser to inquire.

Cited in *Cumming v. Landed Banking & Loan Co.* 20 Ont. Rep. 382, on the duty of a purchaser from an executor to inquire as to the use of the purchase money: *Smith v. McIntyre*, 38 C. C. A. 177, 95 Fed. 585, holding that where land is sold under a power to sell for debts, the purchaser is not bound to inquire whether there are any debts, in order to be protected in his purchase, unless the sale was made an unreasonable time after the testator's death; *Mercer v. Neff*, 29 Ont. Rep. 680, holding that where the land was devised to the executor to hold in trust for himself for life, first to pay her debts, if he sold it, within eighteen months the purchaser was exonerated from all inquiry.

Objection to title after stipulated time has expired.

Distinguished in *Armstrong v. Nason*, 25 Can. S. C. 263, holding that where the vendee had ten days in which to make objections to the title or they would be waived, any objection which did not defeat his present title would be deemed waived unless so made.

Statute of uses as applying to wills.

Cited in *Re Brooke* [1894] 1 Ch. 43, 63 L. J. Ch. N. S. 159, 8 Reports, 24, 70 L. T. N. S. 71, 42 Week. Rep. 186, on the statute of uses as applying to wills.

Cited in note in 10 Eng. Rul. Cas. 885, on application of statute of uses to wills.

21 E. R. C. 553. *LONDON CHARTERED BANK v. LEMPRIERE*, L. R. 4 P. C. 572, 42 L. J. P. C. N. S. 49, 29 L. T. N. S. 186, 9 Moore, P. C. C. N. S. 426, 21 Week. Rep. 513.

General power of appointment in married woman as equivalent to separate estate.

Cited in *Brown v. Foote*, 2 Tenn. Ch. 255, holding that a settlement upon a married woman, with power to appoint the same in any manner she may direct by deed will or writing under her hand, gave her the right to dispose of any part for her support; *Sinclair v. Malay*, 40 N. S. 181, holding that where land was left to the wife to dispose of to the best advantage for the support of the family and to leave the residue as she sees fit and proper, gave her the estate absolutely; *Re Roper*, L. R. 39 Ch. Div. 482, 58 L. J. Ch. N. S. 215, 59 L. T. N. S. 203, 36 Week. Rep. 750, on the grant of a power of appointment to a married woman as making the estate her separate property.

—Liability for debts.

Cited in *Outram v. Hyde*, 24 Week. Rep. 268, on an estate limited to the separate use of a married woman, with power of appointment by will, as being liable for her debts: *Forbes v. Lothrop*, 137 Mass. 523; *Re Harvey*, L. R. 13 Ch. Div. 216, 49 L. J. Ch. N. S. 3, 28 Week. Rep. 73,—holding that property settled on a married woman for life with remainder to such persons as she should appoint by will, was liable for her debts as if it were here separate estate: *Mayd v. Field*, L. R. 3 Ch. Div. 587, 45 L. J. Ch. N. S. 699, 34 L. T. N. S. 614, 24 Week. Rep. 660, holding that personalty settled on a married woman for her separate use for life and then to such as she should appoint, was liable for her general engagements.

Cited in note in 21 Eng. Rul. Cas. 586, on executed general power as assets for payment of debts of deceased donee of the power.

Distinguished in *Gordon v. Warren*, 24 Ont. App. Rep. 44, holding that personal estate settled upon a married woman for her separate use for life, without power of anticipation, and after death to such as she should appoint, or remainder over in default of appointment, is not liable for her contract, where no income had accrued at the time of contract; *Adamson v. Hammond*, L. R. 3 Prob. & Div. 141, 43 L. J. Prob. N. S. 17, 29 L. T. N. S. 700, holding that the estate over which a married woman had a general power of appointment, was not liable for the costs of a contest on the will executing the power.

Liability of separate estate of married woman for debts.

Cited in *Re Wheeler* [1899] 2 Ch. 717, 68 L. J. Ch. N. S. 663, 48 Week. Rep. 10, 81 L. T. N. S. 172, 15 Times L. R. 545, 6 Manson, 372, on the liability of the wife's separate estate; *Lawson v. Laidlaw*, 3 Ont. App. Rep. 77, on the liability of the separate estate of a married woman for her debts by contract; *Geiger v. Blackley*, 86 Va. 328, 10 S. E. 43, holding that the wife's separate estate is liable for a debt contracted on the faith and credit thereof though no reference is made to it; *Bulley v. Bulley*, N. B. Eq. Cas. 450, on the liability of the separate estate of a married woman for debts contracted with reference to such estate; *Kocher v. Cornell*, 59 Neb. 315, 80 N. W. 911, holding that a married woman's separate estate is liable for her debts contracted with reference to it; *Bank of Commerce v. Baldwin*, 14 Idaho, 75, 17 L.R.A.(N.S.) 676, 93 Pac. 504, holding that a married woman's separate estate is liable only for those contracted with reference to it; *Johnston v. Gawtry*, 11 Mo. App. 322; *Hooton v. Ransom*, 6 Mo. App. 19, holding that married woman is considered as feme sole by reason of her separate property, and that property may be resorted to to discharge her obligations; *McKell v. Merchants Nat. Bank*, 62 Neb. 608, 87 N. W. 317, holding that a contract of suretyship is binding on a married woman, when made with reference to, and upon the faith and credit of, her separate estate; *Patrick v. Littell*, 36 Ohio St. 79, 38 Am. Rep. 552, holding that separate estate of married woman is liable under agreement to pay for services in procuring loan of money to remove mortgage from such estate; *Williams v. Urmston*, 35 Ohio St. 296, 35 Am. Rep. 611, holding that a married woman may charge her separate estate in equity by the execution of a promissory note, as surety for her husband; *Merchants' Bank v. Bell*, 29 Grant, Ch. (U. C.) 413, holding that the estate of a married woman was liable to the payment of a note on which she was indorser as surety for her husband; *Kerr v. Stripp*, 40 U. C. Q. B. 125, holding that where the wife signed her husband's note, and it was accepted because of her separate estate, she was liable, though the only consideration was the forbearance of the husband's debt; *Jordan v. Keeble*, 85 Tenn. 412, 3 S. W. 511, holding that the joint note of a husband and wife will not bind the wife's separate estate though the note was accepted on the faith of it, where the separate estate is not mentioned.

Cited in 2 Page, Contr. 1431, on contracts of married woman in equity; *Benjamin*, Sales 5th ed. 55, on capacity of married woman to purchase property.

Distinguished in *Ex parte Jones*, L. R. 12 Ch. Div. 484, 48 L. J. Bankr. N. S. 199, 40 L. T. N. S. 790, holding that a married woman is not liable to the bankrupt law, though she has a separate estate; *Pike v. Fitzgibbon*, L. R. 17 Ch. Div. 454, 50 L. J. Ch. N. S. 394, 44 L. T. N. S. 562, 29 Week. Rep. 551, 6 Eng. Rul. Cas. 56, holding that judgment against a married woman would be enforced

against only so much of her separate estate, to which she was entitled, free from restraint on anticipation, at the time the engagements were entered into.

Unproved averments as affecting costs.

Cited in *Walmsley v. Griffith*, 10 Ont. App. Rep. 327, on the rule as to unproved allegations of fraud: *National Bank v. United Hand-in-Hand & Band of Hope Co.* L. R. 4 App. Cas. 391, 40 L. T. N. S. 697, 27 Week. Rep. 889, holding that if a mortgagee in a redemption suit sets up and fails to prove an absolute title to the mortgaged property, costs may be allowed against him.

Setting aside findings of fraud.

Cited in *Freeman v. Mitchell*, 30 N. S. 513, holding that in absence of evidence of fraud, findings of fraud, so far as appealed against, must be set aside.

21 E. R. C. 565, *PHILLIPS v. CAYLEY*, L. R. 43 Ch. Div. 222, 59 L. J. Ch. N. S. 177, 62 L. T. N. S. 86, 38 Week. Rep. 241, affirming the decision of Kekewich, J., reported in 58 L. J. Ch. N. S. 569, 61 L. T. N. S. 195.

Execution of power with express reference thereto.

Cited in *Davies v. Davies* [1892] 3 Ch. 63, 61 L. J. Ch. N. S. 595, 67 L. T. N. S. 548, 41 Week. Rep. 13, on the validity of the limitation that power is to be exercised by will, referring to subject matter: *Re Tarrant*, 58 L. J. Ch. N. S. 780, holding that a power to appoint for such persons as the person should by will, expressly referring to the power, appoint, was not executed by a devise without mentioning the power.

Cited in notes in 64 L.R.A. 865, 882, 887, on execution by will of power of appointment.

21 E. R. C. 577, *HOLMES v. COGHILL*, 7 Ves. Jr. 499, 6 Revised Rep. 166, affirmed by the Lord Chancellor in 12 Ves. Jr. 206, 8 Revised Rep. 323.

How powers are executed.

Cited in note in 64 L.R.A. 889, on execution by will of power of appointment.

Cited in 2 Washburn, Real Prop. 6th ed. 595, as to how powers are executed through Statute of Uses: 2 Beach, Trusts, 1009, 1010, on manner of execution of power.

General power of appointment as an asset for debts.

Cited in *Duncanson v. Manson*, 3 App. D. C. 260; *Boyce v. Waller*, 9 Dana, 479; *Wales v. Bowdish*, 61 Vt. 23, 4 L.R.A. 819, 17 Atl. 1000,—on a fund with a general power, as subject to the debts of the donee; *Com. v. Duffield*, 12 Pa. 277, Brightly (Pa.) 469, on an unlimited power of disposal as subjecting the fund to liability for debts; *Johnson v. Cushing*, 15 N. H. 298, 41 Am. Dec. 694, holding that the property will not be subjected to debts unless the party, upon whom the power has been conferred has done some act to indicate an intention to execute it; *Jones v. Clifton*, 2 Flipp. 191, Fed. Cas. No. 7,457, as to what powers pass to an assignee in bankruptcy.

Distinguished in *Ashby v. Costin*, L. R. 21 Q. B. Div. 401, 57 L. J. Q. B. N. S. 491, 59 L. T. N. S. 224, 37 Week. Rep. 140, 53 J. P. 69, holding that the death allowance payable by a benefit society was not assets for the payment of debts, although decedent had the power of designating to whom it should go: *Re Roper*, L. R. 39 Ch. Div. 482, 58 L. J. Ch. N. S. 215, 59 L. T. N. S. 203, 36 Week. Rep. 750, holding that an appointment by a married woman in the exercise of a power does not make the appointed property liable for her debts on engagements entered into before the operation of the married women's acts.

The decision of the Lord Chancellor was cited in *Jackson v. Crick*, 19 Week.

Rep. 547, on the liability of a fund subject to a power of appointment for the debts of the donee; *Freeman v. Butters*, 94 Va. 406, 26 S. E. 845, holding that where one exercises a general power of appointment in favor of volunteers, the property becomes assets for the appointer's debts, even in the hands of the volunteers.

Equitable aid to a defective execution of power.

Cited in *Varick v. Edwards*, Hoffm. Ch. 382, on the power of the court to aid a defective execution of the power; *Lyster v. Kirkpatrick*, 26 U. C. Q. B. 217, on the power of a court of equity to make good a defective execution of a power; *Gilman v. Bell*, 99 Ill. 144, holding that a court will aid a defective execution in favor of a purchaser, creditor, wife, or child.

The decision of the Lord Chancellor was cited in *Smith v. McLellan*, 11 Ont. Rep. 191, on the power of a court of equity to aid a defective execution of a power.

—Non-execution.

Cited in *Harrison v. Battle*, 21 N. C. (1 Dev. & B. Eq.) 213, holding that a court may aid the defective execution of a power but not the nonexecution.

The decision of the Lord Chancellor was cited in *Heath v. Bishop*, 4 Rich. Eq. 46, 55 Am. Dec. 654; *Jones v. Fulghum*, 3 Tenn. Ch. 193,—holding that the non-execution of a power will not be aided.

Distinction between power and property.

Cited in *Agee v. Agee*, 22 Mo. 366, on the distinction between power and property; *Patterson v. Lawrence*, 83 Ga. 703, 7 L.R.A. 143, 10 S. E. 355, holding that a power of appointment is not an absolute right of property; *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23, 5 Legal Gaz. 305, holding that a power was not executed by a devise of all the rest and residue of the estate.

21 E. R. C. 586, RE COTTON, L. R. 19 Ch. Div. 624, 51 L. J. Ch. N. S. 514, 46 L. T. N. S. 813, 30 Week. Rep. 610.

Duration of a power of sale.

Cited in *Johns Hopkins University v. Middleton*, 76 Md. 186, 24 Atl. 454, holding that a power will continue to exist where they are necessary to be preserved in order to give effect to the plain and manifest intention of the testator.

—Extinguishment.

Cited in *Heard v. Read*, 171 Mass. 374, 50 N. E. 638, holding that where a power to sell real estate is given to trustees by will for the purpose of changing investments of the trust property and performing the duties of the trust, the power ceases to exist when the trust is terminated by the death of the life tenant; *Sites v. Eldredge*, 45 N. J. Eq. 632, 14 Am. St. Rep. 769, 18 Atl. 214, holding a power of sale annexed to a devise of the fee to be exercised at the discretion of the devisee, and without designating any particular person for whom it should be exercised, expires at the death of the devisee; *Wilkinson v. Buist*, 124 Pa. 253, 10 Am. St. Rep. 580, 16 Atl. 856, 46 Phila. Leg. Int. 326, 23 W. N. C. 311, holding that where a power of sale is given to executors but the time for its exercise is not limited by the words used in its creation, the limitation may become a question of intention.

—Limitation by courts.

Cited in *Morse v. Hackensack Sav. Bank*, 47 N. J. Eq. 279, 12 L.R.A. 62, 20 Atl. 961, on the power of the courts to restrain an unlimited power of sale.

Perpetuities.

Distinguished in *Williams v. Herrick*, 19 R. I. 197, 32 Atl. 913, holding that

where a testator devised the remainder of his estate to trustees in part to erect a building to be forever known by his name, the rents and all income to be divided among his heirs, and vacancies in the board of trustees to be filled by the court of probate ever thereafter, the devise was void as a perpetuity.

21 E. R. C. 594. *M'GAHEY v. ALSTON*, 2 Gale, 238, 6 L. J. Exch. N. S. 29, 2 Mees. & W. 206.

Presumption of appointment arising from exercise of office.

Cited in *Com. v. Wotton*, 201 Mass. 81, 87 N. E. 202, holding that evidence that person is performing duties of public officer is evidence that that person is occupant of office *de jure*; *Callisen v. Hedrick*, 15 Gratt. 244, holding fact that one has acted and been recognized as an officer, is *prima facie* evidence of due appointment; *Kent v. Atlantic De Laine Co.* 8 R. I. 305; *Capwell v. Hopkins*, 10 R. I. 378,—holding same in case of town tax collectors; *Pearson v. Wheeler*, 55 N. H. 41, holding it sufficient to show parties acted as trustees and had the control and management of the road; *Boyd v. Link*, 29 U. C. Q. B. 365, holding in absence of evidence to the contrary, it is to be presumed an agent who has acted for many years as an officer of the government, was duly and legally appointed; *Brown v. Lawrence*, 40 N. S. 370, holding a public license inspector, acting as such is presumed to be duly appointed until the contrary is shown; *Doe ex dem. Barlow v. Hatfield*, 3 N. B. 417, holding fact that a deputy sheriff acted as such is presumptive proof of appointment.

Cited in note in 39 L. ed. U. S. 481, on presumption of innocence and legality.

—Raising the question.

Cited in *Colton v. Beardsley*, 38 Barb. 29, holding it is not material how the question arises, whether in a civil or criminal case.

—Burden of proof.

Cited in *Kandick v. Arthur*, 17 N. S. 289, holding the presumption that the officer had authority, throws the burden upon the party raising the issue.

Proof of loss of instrument to admit secondary evidence.

Cited in *Brigham v. Coburn*, 10 Gray, 329, holding that affidavit of party to suit, that he has made diligent search for deed of assignment to him under insolvent laws, and that it has been lost or mislaid, and is not recorded, is sufficient to admit secondary evidence of its contents; *Johnson v. Arnwine*, 42 N. J. L. 451, 36 Am. Rep. 527, holding reasonable search is sufficient although it does not appear every possible search has been made; *Robards v. McLean*, 30 N. C. (8 Ired. L.) 522, holding that to entitle party to give evidence of contents of paper which it is alleged has been lost, it is sufficient to show that there is no reasonable probability that anything has been suppressed; *Corbett v. Nutt*, 18 Gratt. 624, holding where the proof of loss adduced establishes the fact with reasonable certainty, nothing more is required; *Gordon v. McPhail*, 32 U. C. Q. B. 480, holding it enough to negative every reasonable probability; *Josnez v. Conner*, 7 Daly, 448, holding secondary evidence admissible after proof of search in clerk's office "with great care," by plaintiff's attorney, for an order which should have been recorded in such place; *Hardy v. Desjarlais*, 8 Manitoba L. Rep. 550, holding when a party seeking for an instrument has a reasonable account that it cannot be produced he is entitled to act upon it, without seeking further.

Cited in note in 11 Eng. Rul. Cas. 456, on nature of search required by law for lost document as basis for admission of secondary evidence.

Admissibility of admissions of a principal against his surety.

Cited in *State v. Fullenwider*, 26 N. C. (4 Ired. L.) 364, holding a surety cannot, in general, be affected by evidence of an admission made by his principal; except it be part of his contract, as that accounts kept by him shall be true.

Distinguished in *Stetson v. City Bank*, Ohio St. 167, holding admissions made by the principal, while in office and in the discharge of official duty, are not admissible against the surety to prove facts that had previously transpired.

Disapproved in *Ferrie v. Jones*, 8 U. C. Q. B. 192, holding the books of a clerk of a public company are not good evidence against his surety in an action on his bond during his lifetime.

Competency of a stockholder as a witness for the corporation.

Cited in *Downes v. Maryland & D. R. Co.* 37 Md. 100, holding a stockholder in a railroad company a competent witness for the company in an action to recover an alleged subscription: *Marmora Foundry Co. v. Murney*, 1 U. C. C. P. 29, holding corporation stockholder a competent witness in an action for calls against a defendant stockholder.

Sufficiency of proof to sustain verdict.

Cited in *Stovel v. Allen*, 1 U. C. C. P. 300, on sufficiency of proof of account for work labor and material, to sustain verdict.

21 E. R. C. 598, *CARTER v. MURCOT*, 4 Burr. 2162.

See S. C. 12 E. R. C. 166.

21 E. R. C. 599, *BECKETT v. LEEDS*, L. R. 7 Ch. 421, 26 L. T. N. S. 375, 20 Week. Rep. 454.

Presumption of ownership to middle of street or stream.

Cited in *Simonds v. Chesley*, 30 N. B. 303, holding the general prima facie presumption is that the freehold of the road to its middle line is in the proprietors of the land on either side: *London & W. R. Co. v. Westminster* [1902] 1 Ch. 269, 71 L. J. Ch. N. S. 34, 85 L. T. N. S. 544, 50 Week. Rep. 268, 66 J. P. 343, on application of rule to streets in a town: *Jardine v. Simon*, N. B. Eq. Cas. 1, holding land granted on a non-navigable river is presumed to extend to the bed *usque ad medium filum aque*: *Micklethwait v. Newlay Bridge Co.* 23 E. R. C. 165, L. R. 33 Ch. Div. 133, 51 J. P. 132, 55 L. T. N. S. 336, holding a conveyance of land on one side of an inland stream by the owner who owns on both sides, gives the grantee a right to half of the bed of the river, unless circumstances show the contrary: *Mappin Bros. v. Liberty* [1903] 1 Ch. 118, 72 L. J. Ch. N. S. 63, 87 L. T. N. S. 523, 51 Week. Rep. 264, 67 J. P. 91, 19 Times L. R. 51, 1 Local G. R. 167, holding the presumption of ownership of soil of the street, "*usque ad medium filum*" is rebutted where the conveyance shows an intention not to convey any part of the road: *Landrook v. Metropolitan Dist. R. Co.* 2 Times L. R. 532, holding the presumption that one takes *ad medium filum viae* is rebutted by showing those taking in the first instance took and conveyed only to the adjoining highway: *Coleman v. Robertson*, 30 U. C. C. P. 609, holding where deed restricts to the water's edge of stream at low water mark, the land cannot be deemed to extend beyond that point: *Devonshire v. Pattinson*, L. R. 20 Q. B. Div. 263, 57 L. J. Q. B. N. S. 189, 58 L. T. N. S. 392, 52 J. P. 276, holding the presumption may equally be rebutted by the circumstances under which the deed was executed: *Pryor v. Petre* [1894] 2 Ch. 11, 63 L. J. Ch. N. S. 531, 7 Reports, 424, 70 L. T. N. S. 331, 42 Week. Rep. 435, holding the presumption rebutted by circumstances showing trees in lane were omitted from the valuation and that the lane was not included in the measurement or the map.

Distinguished in *Mellor v. Walmesley* [1905] 2 Ch. 164, 74 L. J. Ch. N. S. 475, 53 Week. Rep. 581, 93 L. T. N. S. 574, 21 Times L. R. 591, as not applicable to a conveyance of land bounded by a tidal river or by the sea shore.

21 E. R. C. 607, *FORBES v. JACKSON*, L. R. 19 Ch. Div. 615, 51 L. J. Ch. N. S. 690, 30 Week. Rep. 652.

Surety's right to subrogation.

Cited in *Nicholas v. Ridley* [1904] 1 Ch. 192, 73 L. J. Ch. N. S. 145, 52 Week. Rep. 226, 89 L. T. N. S. 653, on right of subrogation upon payment by surety; *Bristol W. of E. Land, Mortg. & Invest. Co. v. Taylor*, 24 Ont. Rep. 286, on rights of surety in case of novation of principal's contract.

Cited in note in 68 L.R.A. 529, 531, 585, on extinction of judgments against principals by sureties' payment.

— To benefits of securities held by creditor.

Cited in *Hawker v. Moore*, 40 W. Va. 49, 20 S. E. 848, holding a co-surety who has been compelled to pay off a judgment is entitled to the benefit of the creditor's lien; *Gray v. Coughlin*, 18 Can. S. C. 553, holding the surety entitled not only to the securities held by the creditor when she originally became surety, but all securities obtained after the liability as surety arose; *Gooderham v. Traders Bank*, 16 Ont. Rep. 438, holding a subsequent mortgagee cannot, after transfer to himself, insist on being redeemed as to his own mortgage to the prejudice of the sureties.

Cited in note in 4 E. R. C. 611, on right of indorser receiving notice of dishonor to benefit of securities deposited with holder by principal debtor.

Cited in *Stearns, Suretyship*, 466, 482, on subrogation of surety to securities held by creditor; 1 *Brandt, Suretyship* 3d ed. 666, on subrogation of surety to mortgage given by principal to creditor for security of debt.

Accrual of rights of surety.

Cited in *Labbe v. Bernard*, 196 Mass. 531, 14 L.R.A.(N.S.) 457, 82 N. E. 688, holding the surety's right to the remedies of the principal become inchoate as soon as they enter into the relationship.

— Of liability of surety.

Cited in *Moore v. Jackson*, 16 Ont. App. Rep. 431, holding a charge of purchase money, applied on mortgaged property after the one so charged became surety, erroneous.

Right of redemption by debtor assigning equity of redemption to trustee for creditors.

Cited in *Standard Realty Co. v. Nicholson*, 24 Ont. L. Rep. 46, holding that mortgagor who assigned equity of redemption to trustee for creditors could not redeem from mortgage.

21 E. R. C. 617, *DERING v. WINCHELSEA*, 1 Cox, Ch. Cas. 318, 1 Revised Rep. 41, 1 White & T. Lead. Cas. in Eq. 100, 2 Bos. & P. 270.

Who is entitled to or is liable to contribution.

Cited in *Gillespie v. Campbell*, 5 L.R.A. 698, 39 Fed. 724, holding that accommodation acceptor of bill has no claim for contribution against subsequent accommodation indorsers; *Phillips v. Preston*, 5 How. 278, 12 L. ed. 152, holding that contract between two indorsers, that they will divide loss between them is founded upon sufficient consideration; *Allen v. Fairbanks*, 40 Fed. 188, holding that liability of stockholder to contribute towards debts of company paid by

other stockholders survives him; *Allen v. Fairbanks*, 45 Fed. 445, holding that where stockholder is compelled to pay corporate debt for which another stockholder is liable, he may enforce contribution; *Sturgis v. Cary*, 2 Curt. C. C. 382, Fed. Cas. No. 13,573, holding that right to receive contribution in general average is not founded on contract but in principle of equity; *Dunlap v. Foster*, 7 Ala. 734, holding that when judgment is obtained against principal and sureties, and property of principal is levied upon, third person who became bound in delivery bond for forthcoming of property and has to pay debt, cannot look to sureties for contribution; *Morrow v. Wood*, 56 Ala. 1, holding that contribution could not be compelled by one sustaining loss, from other, who had not entered into engagement which was broken; *Kellogg v. Lopez*, 145 Cal. 497, 78 Pac. 1056, holding that where maker, payee and indorser of note were stockholders in corporation, and note was made and endorsed for accommodation, parties are sureties and entitled each to contribution; *Eliason v. Eliason*, 3 Del. Ch. 260, holding that principle of contribution applies equally in dower, as to other incumbrances; *Eliason v. Eliason*, 3 Del. Ch. 260; *Osborn v. Carr*, 12 Conn. 195,—holding that where land is charged with burden, equity will compel owner of each part to contribute just proportion; *Golsen v. Brand*, 75 Ill. 148; *Rosenbaum v. Goodman*, 78 Va. 121; *Warner v. Morrison*, 3 Allen, 566,—holding that action for contribution lies between sureties who signed note at different times and without any agreement to become joint sureties; *Waters v. Riley*, 2 Harr. & G. 305, 18 Am. Dec. 302, holding that surety cannot compel contribution by representatives of his deceased co-surety, against whom creditor had no remedy; *Middleborough v. Taunton*, 2 Cush. 406, holding that where line between two towns, situated in different counties is center of highway and one of the towns is indicted for not repairing road, and submits to fine, which is used to repair road, such town cannot recover half of money paid from other town; *McCormick v. Gibson*, 3 Bland, Ch. 498 note, on postponement of claim for contribution until adjustment of claims of creditors of decedent; *Zollickoffer v. Seth*, 44 Md. 359, holding that right of contribution exists as between representatives of deceased co-surety; *Morrissey v. Weed*, 12 Hun, 491, holding that where some members of joint stock company paid more than their share contribution could be enforced against others; *Boardman v. Paige*, 11 N. H. 431; *Mills v. Hyde*, 19 Vt. 59, 46 Am. Dec. 177,—holding that one of two joint contractors having paid debt, may sustain action for contribution against co-contractors, although statute of limitations had run when payment was made; *Aspinwall v. Sacchi*, 57 N. Y. 331, holding that stockholder liable under statute for debt of corporation can maintain action against other stockholders for contribution; *Peck v. Ellis*, 2 Johns. Ch. 131, holding there is no right to contribution between wrongdoers; *Robinson v. Boyd*, 60 Ohio St. 57, 53 N. E. 494, holding that all that is required to give right of contribution is, that debt should be common to parties, and primarily that of same person; *Philadelphia Trust, S. D. & Ins. Co. v. Fame Ins. Co.* 9 Phila. 292, 30 Phila. Leg. Int. 60, holding that contract of reinsurance is contract of indemnity, and does not give rise to contribution; *Swain v. Barber*, 29 Vt. 292, holding that surety who had paid nothing on account of principal had no claim against co-surety, either contingent or otherwise that could be allowed under bankrupt law; *Harper v. Knowlson*, 2 U. C. Err. & App. 253, holding that where two remaining partners agreed to indemnify retiring partner each was liable for one half of amount expended under such agreement; *Ianson v. Paxton*, 23 U. C. C. P. 439 (reversing 22 U. C. C. P. 505), holding that first endorser of accommodation note could not compel contribu-

tion from second endorser: *Lamb v. North*, 3 D. L. R. 774, holding that partner who has paid money for firm benefit, cannot, on ground that some of partners have left province hold other partners liable for more than their proportionate share thereof.

Who are co-sureties or co-obligors.

Cited in *Spencer v. Houghton*, 2 Cal. Unrep. 464, 6 Pac. 853, holding that where defendant became surety on former bond of guardian, he and other sureties on former bond became joint obligors and release of one released all; *Hutchison v. Roberts*, 8 Houst. (Del.) 459, 17 Atl. 1061, holding that A, B, and C, being sureties on separate instruments, did not become co-sureties by being co-obligees in bond of indemnity for debts of principal, nor entitled to share in money advanced by third person to two of sureties; *Houck v. Graham*, 106 Ind. 195, 55 Am. Rep. 727, 6 N. E. 594, holding that persons who endorse notes, not in regular course, to give maker credit, and who have knowledge that person whose name is attached as maker is in fact surety, are co-sureties, and bound to contribute: *State use of Wolff v. Berning*, 74 Mo. 87; *Enicks v. Powell*, 2 Strobb. Eq. 196,—holding that sureties on first bond and different sureties on additional bond, given by administrator are all to be regarded as parties to common undertaking, and responsible to extent of amount undertaken by each; *Cutter v. Emery*, 37 N. H. 567, holding that if two persons sign same obligation as sureties for third,—one of them at request of principle, and other at request of first surety, first surety stands in relation of principal to second, and no right of contribution exists; *Daniel v. McRae*, 9 N. C. (2 Hawks) 590, 11 Am. Dec. 787, holding that endorsers on accommodation paper for benefit of third person are to be regarded as sureties, and entitled to contribution; *Harnsberger v. Yancey*, 33 Gratt. 527, holding that sureties bound for same principal but not for same debt, and under different instruments are not co-sureties; *Pitkin v. Flanagan*, 23 Vt. 160, 56 Am. Dec. 61, holding that as between accommodation endorsers, who all sign before paper is put in circulation order of indorsement raises no presumption of any obligation among themselves.

Creation of relation of principal and surety.

Cited in *Beacon Lamp Co. v. Travellers Ins. Co.* 61 N. J. Eq. 59, 47 Atl. 579, holding that assured in indemnity policy is surety and indemnity company principal and former may sue to compel latter to perform its contract; *Youngs v. Trustees of Public Schools*, 31 N. J. Eq. 290, holding that covenant by grantee of mortgaged premises to assume and pay mortgage debt is contract with grantor only for indemnity of latter, and may be released and discharged by him: *Johnson v. Young*, 20 W. Va. 614, holding that where one of two copartners purchases interest of other in firm property, and assumes and agrees to pay firm debts, as to such debts former becomes principal debtor and latter surety.

Liability of sureties.

Cited in *Monson v. Drakeley*, 40 Conn. 552, 16 Am. Rep. 74, holding that one who signs note after delivery under signatures of other sureties, and takes security, is presumed to sign as surety and is liable to contribution; *Wolff v. Schaeffer*, 4 Mo. App. 367, holding that surety on additional bond of administrator is liable for amount of order of distribution, where administrator has failed to comply with order; *Corrigan v. Foster*, 51 Ohio St. 225, 37 N. E. 263, holding that where successive bonds with different sets of sureties, have been given by executor, and devastavit has occurred before execution and approval of any of bonds liability of sureties in subsequent bonds is secondary to bonds in force at time estate was wasted; *Denny v. Seeley*, 34 Or. 364, 55 Pac. 976, hold-

ing that where one who is not personally responsible as surety pledges his property to secure debt, such property becomes surety for principal debtor, and any act of creditor that would relieve surety will relieve property; *Malone v. Stewart*, 235 Pa. 99, 83 Atl. 607, holding that where several persons are sureties on separate bonds for varying amounts, for completion of building, and are compelled to complete building, they are compellable to contribute in proportion to amount of bonds; *Fidelity & D. Co. v. Phillips*, 235 Pa. 469, 84 Atl. 432, holding that liability of each surety in several bonds is measured by penal sum in respective bonds.

Contribution among co-obligors.

Cited in *Young v. Clark*, 2 Ala. 264; *Hobart v. Stone*, 10 Pick. 215; *Fitzpatrick v. Hill*, 9 Ala. 783; *Young v. Lyons*, 8 Gill, 162,—holding that where there are several sureties, and one becomes insolvent, those who pay whole debt can compel contribution from remaining solvent sureties, towards entire debt paid: *Bezzell v. White*, 13 Ala. 422, holding that when one surety sues co-surety for contribution, for money paid by former, for principal debtor, latter may show that surety suing was indebted to principal debtor in larger amount than he was obliged to pay; *Dugger v. Wright*, 51 Ark. 232, 14 Am. St. Rep. 48, 11 S. W. 213, holding that where sureties on executor's bond are discharged by court and new sureties taken, two sets of sureties become jointly liable for former breach of bond, and right of contribution exists; *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60, 59 Pac. 762, holding that sureties are at law liable to contribute proportion of respective amounts as penalties for which they become surety; *Byers v. Alcorn*, 6 Ill. App. 39; *Bell v. Jasper*, 37 N. C. (2 Ired. Eq.) 597; *Stevens v. Tucker*, 87 Ind. 109; *Snow v. Brown*, 100 Ga. 117, 28 S. E. 77,—holding that right to contribution exists between sureties, although bound by different instruments; *Springer v. Foster*, 27 Ind. App. 15, 60 N. E. 720, holding that no right of contribution exists between two persons who each purchase part of tract of land covered by mortgage where each assumes payment of whole mortgage; *Bachelor v. Fiske*, 17 Mass. 464, holding that assumpsit lies on implied promise by one surety to contribute towards indemnifying another; *Scribner v. Adams*, 73 Me. 541; *Washington, O. & W. R. Co. v. Cazenove*, 83 Va. 744, 3 S. E. 433; *Hauser v. King*, 76 Va. 731; *Seibert v. Thompson*, 8 Kan. 65,—holding that if one of several sureties subsequently take security from principal for his own indemnity, it enures to common benefit of all sureties; *Smith v. Rumsey*, 33 Mich. 183, holding that contribution between sureties is enforceable in court of equity; *Mueller v. Barge*, 54 Minn. 314, 56 N. W. 36; *Allen v. Wood*, 38 N. C. (3 Ired. Eq.) 386; *Miller v. Sawyer*, 30 Vt. 412; *McMahon v. Fawcett*, 2 Rand. (Va.) 514, 14 Am. Dec. 796; *Agnew v. Bell*, 4 Watts, 31,—holding that where funds are placed in one surety's hands by principal to pay debt, he will be deemed to hold such funds for benefit of all sureties; *Van Petten v. Richardson*, 68 Mo. 379, holding that debtor may recover from co-debtor whatever he was compelled to pay in excess of his due proportion of original demand and incidental expenses; *Stothoff v. Dunham*, 19 N. J. L. 181; *McKenna v. George*, 2 Rich. Eq. 15,—holding that where one of several sureties pays debt, he has same right to contribution from representative of deceased surety as from surviving cosurety; *Kinthead v. Ryan*, 64 N. J. Eq. 454, 53 Atl. 1953, holding that one who is tenant for life of land and also tenant in remainder of interest therein may in either capacity redeem land and be subrogated to lien on each of other remaindermen for his share in redemption money; *Bradley v. Burwell*, 3 Denio, 61, holding that representative of deceased surety is liable for contribution; *Douglass v.*

Howland, 24 Wend. 35, to the point that judgment may be received to show amount of indebtedness in suit by surety for contribution; *Norton v. Coons*, 3 Denio, 130, holding that one of several sureties who pays debt may call upon other sureties for contribution, whether they were bound jointly or severally and whether by same or different instruments; *Toucey v. Schell*, 15 Misc. 350, 37 N. Y. Supp. 879, holding that under bond binding sureties severally in penal sums aggregating that for which principal is liable, surety has right of action against others for contribution; *Frost v. Lowry*, 15 Ohio, 200, holding that no right of contribution arises between surety on supersedeas and original surety on undertaking to discharge attachment; *Thompson v. Dekum*, 32 Or. 506, 52 Pac. 517, holding that where successive bonds with same penalties, given by executor for performance of his duties are cumulative security, liability of sureties thereon for contribution are as if all had signed same bond; *Moore v. Lassiter*, 16 Lea, 630 (dissenting opinion), on right of surety who becomes such in course of legal proceedings to contribution, against surety for debt; *Hanby v. Henritze*, 85 Va. 177, 7 S. E. 204, holding that where original surety will be exempt from contribution to later surety, if such original surety pays, he has right to enforce obligation of later surety for his own indemnity; *Nuzum v. Morris*, 25 W. Va. 559; *Boughner v. Hall*, 24 W. Va. 249,—holding that surety who has received money on claims belonging to debtor, must account therefor in action for contribution against co-sureties; *Edmonds v. Sheahan*, 47 Tex. 443,—holding that where surety discharged judgment with confederate money, value of confederate money, at time of payment will be measure of amount he can receive as contribution; *Strother v. Mitchell*, 80 Va. 149, holding that where principal is insolvent, surety against whom judgment has been rendered may have judgment against his co-surety; but not otherwise, under Code; *Liddell v. Wiswell*, 59 Vt. 365, 8 Atl. 680, holding that discharge in bankruptcy is bar to liability of surety for his principal, but not to equitable liability between co-sureties in action for contribution, when payment was subsequent to discharge; *Re Denton* [1903] 2 Ch. 670, 72 L. J. Ch. N. S. 732, 89 L. T. N. S. 62, 52 Week. Rep. 93, holding where position of parties is such as to subject them to a common burden or liability, which one of them discharges, equity will enforce contribution; *Oldham v. Broom*, 28 Ohio St. 41, holding for this reason where one co-surety pays more than his share, he may compel contribution; *Field v. Pelot*, M'Mull. Eq. 369, on the right of contribution among co-sureties; *Field v. Pelot*, M'Mull. Eq. 369, to the point that if new security is required by court, bond might be regarded as accumulative, and sureties entitled to mutual contribution; *Walton v. Williams*, 1 Va. Dec. 579, holding that where there are several annual bonds, differing in amount, the liability of the different sets of sureties is not equal but in proportion to the penalties of the different bonds; *Mitchell v. English*, 17 Grant, Ch. (U. C.) 303, holding that co-sureties for same debt are liable to mutual contribution, although they contract without knowledge of each other; *Menzies v. Kennedy*, 23 Grant, Ch. (U. C.) 360, holding that where one of two co-sureties has security from principal, it enures to benefit of both; *Wolmershausen v. Gullick* [1893] 2 Ch. 514, 62 L. J. Ch. N. S. 773, 3 Reports, 610, 68 L. T. N. S. 753, 12 Eng. Rul. Cas. 823, holding a surety may maintain suit to enforce contribution where judgment on guarantee has been recovered against him, but before payment has been enforced; *Robinson v. Harkin* [1896] 2 Ch. 415, 65 L. J. Ch. N. S. 773, 74 L. T. N. S. 777, 44 Week. Rep. 702, holding the principles of contribution applicable to co-sureties apply equally as between co-trustees; *Bacon v. Camphausen*, 58

L. T. N. S. 851, holding fact that one trustee acts honestly though erroneously and the other absents himself from duty, does not relieve the absent one from a duty to contribute his share; *Roberts v. Crowe*, L. R. 7 C. P. 629, 41 L. J. C. P. N. S. 198, 27 L. T. N. S. 238, holding it a principle of law applicable in all cases that where one who is only secondarily liable is compelled to perform an obligation for which another person is primarily liable he has his remedy over against the one primarily liable; *Edmunds v. Wallingford*, L. R. 14 Q. B. Div. 811, 54 L. J. Q. B. N. S. 385, 52 L. T. N. S. 720, 33 Week. Rep. 647, 49 J. P. 549, holding where a person's goods are lawfully seized and sold for another's debt, the owner of the goods is entitled to recover the value of them from the debtor; *Fitzgerald v. McCowan* [1898] 2 Ir. Q. B. 1, holding in absence of express arrangement to the contrary, a cocontractor who pays more than his quota is entitled to contribution from his cocontractors.

Distinguished in *Leigh v. Dickeson*, L. R. 12 Q. B. Div. 194, 53 L. J. Q. B. N. S. 120, 50 L. T. N. S. 124, holding in tenant in common, making ordinary repairs on a house has no claim to contribution from his cotenant; *Ramskill v. Edwards*, L. R. 31 Ch. Div. 100, 55 L. J. Ch. N. S. 81, 53 L. T. N. S. 949, 34 Week. Rep. 96, holding a director of a company who was not present when loan was made upon unauthorized security cannot be held to contribution by one who was present and who later was compelled to pay a loss resulting.

—Basis of the right.

Cited in *Hutchison v. Roberts*, 8 Houst. (Del.) 459, 17 Atl. 1061; *Dysart v. Crow*, 170 Mo. 275, 70 S. W. 689; *Sharp v. Cheatham*, 88 Mo. 498, 57 Am. Rep. 433; *Campbell v. Mesier*, 4 Johns. Ch. 334, 8 Am. Dec. 570; *Armstrong County v. Clarion County*, 66 Pa. 218, 5 Am. Rep. 368; *Claybrook v. Scott*, 1 Va. Dec. 316; *Moore v. Baker*, 34 Fed. 1; *London v. Citizens' Ins. Co.* 13 Ont. Rep. 713; *Ruabon S. S. Co. v. London Assurance* [1900] A. C. 6, 69 L. J. Q. B. N. S. 86, 81 L. T. N. S. 585, 48 Week. Rep. 225, 9 Asp. Mar. L. Cas. 2, 5 Com. Cas. 71, 16 Times L. R. 90; *Central Trust Co. v. Louisville Trust Co.* 87 Fed. 23,—holding that right and duty of contribution is founded upon doctrines of equity: it does not depend upon contract; *McCullum v. Boughton*, 132 Mo. 601, 35 L.R.A. 480, 34 S. W. 480 (dissenting opinion), on contribution between sureties as founded not upon contract, but upon principles of equity and justice; *Garrett v. Sayles*, 1 Fed. 371, to the point that right to contribution does not depend upon contract, but upon equitable duty; *Walker v. Cheever*, 35 N. H. 339, holding that bill in equity might be maintained to compel contribution, where such mode of enforcement would avoid multiplicity of suits; *Ayer v. Tilton*, 42 N. H. 407, holding that action by one surety against another for contribution is an equitable proceeding, and if it appear that defendant joined in contract at request of plaintiff, he will not have to pay; *Wright v. Garlinghouse*, 26 N. Y. 539 (dissenting opinion), on right to contribution between sureties as founded upon equitable principles; *Reid v. King*, 158 N. C. 85, 73 S. E. 168; *Amory v. Lowell*, 1 Allen, 504,—holding that neither right of contribution nor subrogation rests upon contract: but both upon natural justice and equity; *Oldham v. Broom*, 28 Ohio St. 41; *Kalbach's Estate*, 2 Woodw. Dec. 415,—holding that right of one surety liable for debt upon payment of same to require contribution from others, is right founded upon principles of equity; *Goff v. Campbell*, 11 Kulp, 168, holding that at the bottom of contribution is a fixed principle of justice, and is not founded upon contract; *Durbin v. Kamey*, 19 Or. 71, 23 Pac. 661, holding that right of contribution between sureties does not spring from contract, but rests on general principles of natural

justice; *Kennedy v. Carpenter*, 2 Whart. 344, to the point that right to contribution does not depend upon contract: *Tate v. Winfree*, 99 Va. 255, 37 S. E. 956, holding that right of action of surety who calls upon cosurety for contribution is based upon implied promise growing out of equitable relations which sureties bear to each other, and not upon written contract by which they became sureties; *Duncan v. North & S. W. Bank*, L. R. 6 App. Cas. 1, 50 L. J. Ch. N. S. 355, 43 L. T. N. S. 706, 29 Week. Rep. 763, 4 Eng. Rul. Cas. 591, holding the right of contribution is quite independent of any contract between the parties thus liable; *Bonner v. Tottenham & E. Permanent Invest. Bldg. Soc.* [1899] 1 Q. B. 161, 68 L. J. Q. B. N. S. 114, 47 Week. Rep. 161, 79 L. T. N. S. 611, 15 Times L. R. 76, on same point; *Cross v. Searboro*, 6 Baxt. 134, holding the principle of contribution rests on the equality of the burden; *Stirling v. Forrester*, 3 Bligh, 575, 22 Revised Rep. 69, holding it founded in doctrines of equity; *Harris v. Ferguson*, 2 Bail. L. 397, holding it the result of a general equity founded on the equality of burden and benefit; *Ward v. National Bank*, L. R. 8 App. Cas. 755, 52 L. J. P. C. N. S. 65, 49 L. T. N. S. 315; *Corprew v. Boyle*, 24 Gratt. 284, holding the claim for contribution among cosureties is founded not upon contract but upon principles of natural justice and equity; *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669, holding it is not founded upon the contract of suretyship; *Davies v. Humphreys*, 6 Mees. & W. 153, 9 L. J. Exch. N. S. 263, 4 Jur. 250, 21 Eng. Rul. Cas. 632, holding the right of contribution is founded upon principles of equity, though it is considered the foundation of an action.

— Distribution of burden.

Cited in *North v. Brace*, 30 Conn. 60, holding that where share of each signer of instrument was fixed proportions of whole loss, proposition in which solvent subscribers were to contribute was not affected by insolvency of others; *Watkins v. Worthington*, 2 Bland, Ch. 509, holding that where all parties are before court decree may direct payment by principal, if able and if not that each surety will contribute his proportion; *Breckenridge v. Taylor*, 5 Dana, 110; *Henderson v. McDuffie*, 5 N. H. 38, 20 Am. Dec. 557,—holding that where there are three sureties, if one be insolvent and another pay all debt, third shall contribute moiety; *Morgan v. Smith*, 70 N. Y. 537, holding that if one surety pays less than whole debt, he can recover from cosurety amount which he has paid in excess of his moiety; *Malone v. Stewart*, 18 Pa. Dist. R. 905; *Armitage v. Pulver*, 37 N. Y. 494,—holding that where there are several distinct bonds with several distinct penalties, contribution is in proportion to penalties; *Bailey's Estate*, 156 Pa. 634, 22 L.R.A. 444, 27 Atl. 560, 33 W. N. C. 89, holding that where two persons are jointly and severally bound as sureties there is implied promise by each surety to other to pay one half of debt in case of inability of principal; *Sawyer v. Lyon*, 10 Johns. 32, holding that persons jointly liable for debt must pay each his aliquot share; *Riley v. Rhea*, 5 Lea, 115, holding that surety on bond of defaulting clerk, whose property has been sold to satisfy default, is entitled to contribution against cosureties only pro rata, without regard to fact of insolvency of anyone of them; *Tessenne Hospital v. Fugua*, 1 Lea, 608, holding sureties on renewal bonds of a guardian liable to contribution to the common loss in the proportion of their respective liabilities; *Jones v. Hays*, 38 N. C. (3 Ired. Eq.) 502, 44 Am. Dec. 78; *Loring v. Bacon*, 3 Cush. 465,—holding that sureties in different sums on guardian's bond are as between each other compellable to contribute in proportion to different penalties of respective bonds; *Fischer v. Gaither*, 32 Or. 161, 51 Pac. 736, holding that one

surety, having paid common obligation, cannot sue at law to compel cosurety to pay more than his aliquot part of original undertaking on account of insolvency of another surety, his remedy being in equity; *Merchants' Nat. Bank v. McAnulty*, 89 Tex. 124, 33 S. W. 963, holding that right of co-obligor to contribution extends only to excess paid over his proportional part; *Faulkner v. Davis*, 12 Gratt. 651, 98 Am. Dec. 698, holding that where one of two sureties of insolvent administrator purchases legacies for which sureties are bound at discount, he shall only charge his cosurety for his proportion of what he paid for legacies; *Pace v. Pace*, 95 Va. 792, 44 L.R.A. 459, 30 S. E. 361, holding that surety who has been obliged to pay can prove entire debt against insolvent estate of cosurety, and receive dividends upon entire debt until reimbursed that half of common burden belonged to cosurety; *Hawker v. Moore*, 40 W. Va. 49, 20 S. E. 848, holding that surety who has been compelled to pay whole debt has right in equity to compel his cosurety to pay his equitably equal part; *Ostrander v. Jarvis*, 18 Ont. L. Rep. 17, holding that sureties on several different instruments are liable to contribute in proportion to the amount of their respective obligations; *Ellesmere Brewery Co. v. Cooper*, 21 E. R. C. 622, 65 L. J. Q. B. N. S. 173, 73 L. T. N. S. 567, [1896] 1 Q. B. 75, 44 Week. Rep. 254, holding where claim of the creditor is less than full amount of debt and is discharged by one surety, the claim must be proportionally borne by the others; *Re Arcedeckne*, L. R. 24 Ch. Div. 709, 53 L. J. Ch. N. S. 102, 48 L. T. N. S. 725, holding a surety who has been compelled to pay has a right of contribution but where insurance on life of debtor has been assigned to him he must account for money received thereon before contribution will be decreed.

—Termination of right of contribution.

Cited in *Lusby v. Carr*, 60 Md. 192, holding that cosureties may by agreement among themselves, so far sever their unity of interest and obligation, as to terminate right to contribution.

—Prerequisites to contribution or similar relief.

Cited in *Knighton v. Curry*, 62 Ala. 404, holding that until surety has paid debt, he cannot be entitled to contribution; *Chrisman v. Jones*, 34 Ark. 73, holding that right to contribution arises on payment and principal is only necessary party to its enforcement because he should be present to answer primarily; *Chaffee v. Jones*, 19 Pick. 260, holding that fact that party put his name on back of note at request of principal and without knowledge of surety who signed on face, does not affect his right to recover contribution; *Odlin v. Greenleaf*, 3 N. H. 270, holding that surety who pays debt may compel cosurety to contribute without showing inability of principal to pay; *Holcombe v. Fetter*, 70 N. J. Eq. 300, holding that surety may file bill to compel payment by principal debtor, as soon as debt becomes payable; *Lynch v. Hancock*, 14 S. C. 66, holding that where surety gives note in payment of debt, he is not entitled to recover amount of note from principal, unless he shows that note has been paid, or that he has means to pay it; *Ex parte First Nat. Bank*, 25 S. C. 362, holding that surety cannot enforce contribution until debt has been paid; *Eberhardt v. Wood*, 2 Tenn. Ch. 488, holding that claim of one surety against cosurety on administrator's bond for contribution, is provable in bankruptcy of cosurety, if liability of principal became fixed before petition in bankruptcy; *Macey v. Childress*, 2 Tenn. Ch. 438, holding that surety may maintain action on promise indemnifying him against liability as soon as he becomes liable to pay although he has not actually paid anything.

— Measure of liability in action for contribution.

Cited in *Vandiver v. Pollak*, 107 Ala. 547, 54 Am. St. Rep. 118, 19 So. 180, holding that satisfaction of judgment for damages on indemnifying bond of one of several attaching creditors inures to benefit of all, and in suit for contribution is measure of common liability.

Doctrine of subrogation.

Cited in *Citizens' Nat. Bank v. Wert*, 26 Fed. 294, holding that when secured obligation has become due, debtor may by agreement, without consent of creditor, substitute in place of latter another person who pays creditor; *United States v. Ryder*, 110 U. S. 729, 28 L. ed. 308, 4 Sup. Ct. Rep. 196; *Sands v. Durham*, 99 Va. 263, 54 L.R.A. 622, 86 Am. St. Rep. 884, 38 S. E. 145; *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286; *Sherman v. Shaver*, 75 Va. 1; *Leggett v. McClelland*, 39 Ohio St. 624; *Crisfield v. State*, 55 Md. 192; *Burton v. Mill*, 78 Va. 468,—holding that doctrine of subrogation rests not on contract, but on natural justice; *Turner v. Citizens' Bank*, 111 Va. 184, 68 S. E. 407, holding that subrogation does not flow from any fixed rule of law but rather from principles of justice, equity and benevolence; *Peake v. Dorwin*, 25 Vt. 28, to the point that right of subrogation exists where one is compelled to pay debt to protect his own interest.

Right of subrogation.

Cited in *Re Baldwin*, 8 Cent. L. J. 186, Fed. Cas. No. 796, holding that indorser who held stock as security for note of bankrupt should give credit for amount received upon security and should take dividend only on excess of debt over amount received; *Bradford v. Mooney*, 2 Cin. Sup. Ct. Rep. 468, holding that there was no right of subrogation between sureties on attachment bond and sureties on bond in error; *Roseberry's Appeal*, 10 Phila. 502, 30 Phila. Leg. Int. 273 (affirming 4 Walk. (Pa.) 434), holding that where the original debt springs from a partnership account there can be no substitution before a settlement of the partnership accounts; *Musgrave v. Dickson*, 27 Pittsb. L. J. N. S. 85, holding that unless the surety pays in full he is not entitled to subrogation; *Belcher v. Wickersham*, 9 Baxt. 111, holding that where heirs paid off certain mortgages on land, believing estate was solvent, were not upon discovering mistake entitled to be subrogated to rights of mortgagors, where such right could not be exercised without injustice to others; *Harlan v. Sweeny*, 1 Lea, 682, holding that subrogation is creature of equity and will never be allowed to prejudice of creditor.

— Right of surety to subrogation to creditor's rights.

Cited in *Re Nickerson*, 116 Fed. 1003, holding that under law of Massachusetts, wife who has signed notes with her husband as joint maker, but who is in fact surety, may prove notes against husband in bankruptcy; *Newton v. Field*, 16 Ark. 216, on right of subrogation of surety paying debt for principal to rights and securities of the creditor; *Jackson v. Davis*, 4 Mackey, 194, holding that where one of two sureties on bond given to United States pays debt, he is entitled, in his claim for contribution to be subrogated to priority of United States over other creditors of estate of cosurety; *Junker v. Rush*, 136 Ill. 179, 11 L.R.A. 183, 26 N. E. 499, holding that surety's right to subrogation for purpose of keeping alive as against principal judgment which he has paid is barred when his action against principal upon implied assumpsit for indemnity is barred; *Friberg v. Donovan*, 23 Ill. App. 58, holding that where judgment against principal debtor and his surety has been appealed by former without consent of latter, surety on payment of judgment is entitled to subrogation

against surety on appeal bond: *Kane v. State*, 78 Ind. 103, holding that replevin bail may be subrogated to rights of state in license bond, and may recover thereon from licensee and his sureties in such bond amount so paid by such replevin bail; *Gerber v. Sharp*, 72 Ind. 553, holding that surety who has paid judgment is entitled to be subrogated to all rights of creditor as to any fund, lien, or equity he may have; *Snook v. Munday*, 96 Md. 514, 54 Atl. 77, holding that where surety seeks to pay debt in order to be subrogated to rights of creditor, payment into court of whole amount due under bill to enforce right of subrogation is sufficient tender; *Wallace v. Jones*, 110 Md. 143, 72 Atl. 769, holding that when surety pays debt of his principal to creditor, he is subrogated to rights and liens of creditor against principal debtor; *Furnold v. Bank of State*, 44 Mo. 336, holding that where judgment was recovered against number of cosureties, who subsequently, sold land owned by them respectively, while same was subject to lien of judgment, purchaser of one parcel who was forced to pay judgment, was entitled to subrogation; *Patterson v. Birdsall*, 6 Hun. 632, holding that surety stands in place of creditor, upon payment of debt as completely as if instrument had been transferred to him; *Musgrave v. Dickinson*, 172 Pa. 629, 51 Am. St. Rep. 765, 33 Atl. 705, holding that unless surety pays debt in full, he is not entitled to subrogation; *Robertson v. Trigg*, 32 Gratt. 76, holding that two of sureties of United States collector, who has made default, and deed insolvent, are entitled to be subrogated to right of priority of United States as against estate of another surety who died before insolvency of collection; *National Bank v. Cushing*, 53 Vt. 321, holding that when partner mortgages his private property to secure firm debt, which is also secured by mortgage on firm property, he is entitled to be subrogated as surety, to rights of mortgagee; *Myers v. Miller*, 45 W. Va. 595, 31 S. E. 976, holding that sureties on sheriff's bond, upon being compelled to make good default if principal will, by fact of payment, become equitable assignee and be subrogated to position of state as to all securities; *Cameron v. Boulton*, 9 U. C. C. P. 537, holding that where one of three cosureties having paid debt he is entitled to be subrogated to the rights of the creditor.

Surety's right to securities given by principal.

Cited in *Rooker v. Benson*, 83 Ind. 250; *Shultz v. Hansbrough*, 33 Gratt. 567; *Fielding v. Waterhouse*, 8 Jones & S. 424,—holding that right of surety is not only that of subrogation, but right to assignment by creditor; *Blake v. Traders' Nat. Bank*, 145 Mass. 13, 12 N. E. 414, holding that where surety pays debt, he takes place of creditor as to debt and as to security therefor; *Brown Carriage Co. v. Dowd*, 155 N. C. 307, 71 S. E. 721; *Lochenmeyer v. Fogarty*, 112 Ill. 572; *Price v. Truesdell*, 28 N. J. Eq. 200,—holding that surety has right to have collaterals applied to payment of note; *Berthold v. Berthold*, 46 Mo. 557, holding that surety who pays debt of his principal is entitled to assignment of instrument paid; *Rathbone v. Stocking*, 2 Barb. 135, holding that where a judgment by confession is rendered in favor of several sureties each surety is entitled to share according to the amount of his liability; *Chaffin v. Campbell*, 4 Sneed, 184, holding that one who becomes surety in course of legal proceedings against principal, has no right of contribution against original security for debt; *Newton v. Chorlton*, 10 Hare, 646, 2 Drew, 333, holding the surety entitled by his contract of suretyship to benefit of all securities for the debt held by creditor at time of contract; *Steel v. Dixon*, L. R. 17 Ch. Div. 825, 50 L. J. Ch. N. S. 591, 45 L. T. N. S. 142, 29 Week. Rep. 735, holding a security given by principal debtor to one cosurety must be brought into hotchpot for benefit of the cosureties.

Cited in note in 68 L.R.A. 541, 557, 564, on extinction of judgments against principals by sureties' payment.

Right to show that relationship of surety to principal exists.

Cited in *Smith v. Clopton*, 48 Miss. 66; *Carpenter v. King*, 9 Met. 511, 43 Am. Dec. 405,—holding that when two persons jointly and severally, sign obligation for payment of money, one of them may show, that he was surety for other.

Right of surety to indemnity security.

Cited in *Gieseke v. Johnson*, 115 Ind. 308, 17 N. E. 573, holding that the action by a surety against his principal on a note is not upon the note but upon the implied promise of indemnity, and he can recover no more than he pays; *Scheidt v. Sturgis*, 10 Bosw. 606, holding that creditors to whom surety is liable upon contract may reach any securities placed by principal debtor in hands of surety to indemnify him; *Smith v. Harry*, 91 Pa. 119, holding that surety on executor's bond who advanced money to pay sum ordered to be distributed was entitled to benefit of mortgage given by executor to indemnify sureties.

Right of surety on administrator's bond to follow land.

Cited in *Richardson v. Inglesby*, 13 Rich. Eq. 59, holding that sureties on administrator's bond cannot follow land, where personalty was more than sufficient to pay debts.

Right of action of surety against principal as founded on written contract.

Cited in *Lamb v. Withrow*, 31 Iowa, 164, holding that where parol testimony is necessary to show relation of principal and surety, and instrument has been merged in judgment, right of action at law by surety against principal will be treated as founded upon written contract, and is barred in five years.

Right of creditor to securities.

Cited in *Gibbes v. Greenville & C. R. Co.* 13 S. C. 228, holding that when principal debtor has given security against his liability, creditor is entitled to benefit of security.

Creation of relationship of creditor and debtor.

Cited in *Spratt v. Pierson*, 4 S. C. 301, holding that one cannot become creditor of another, unless by some agreement express or implied.

Contract against liability to contribution.

Cited in *Harrison v. Lane*, 5 Leigh, 414, 27 Am. Dec. 607, holding that where principal agreed that sureties in additional bond required from deputy by sheriff would not be called upon, so long as sureties on first were residents, no contribution could be had against latter; *Keith v. Goodwin*, 31 Vt. 268, 73 Am. Dec. 345, holding that one who signs as surety may so stipulate as not to be liable to contribution with other sureties who have signed before him; *Craythorne v. Swinburne*, 21 E. R. C. 636, 9 Revised Rep. 264, 14 Ves. Sr. 160, holding one may by contract take himself out of reach of the principal of contribution.

Inequitable conduct barring equitable relief.

Cited in *Bateman v. Fargason*, 2 Flipp. 660, 4 Fed. 32, holding that maxim "He that comes into equity must do so with clean hands," applies only to conduct of party in transaction under consideration; *Trice v. Comstock*, 61 L.R.A. 176, 57 C. C. A. 646, 121 Fed. 620; *Shaver v. Heller & M. Co.* 65 L.R.A. 878, 48 C. C. A. 48, 108 Fed. 821,—holding that iniquity which will repel one from court of equity, must have immediate and necessary relation to equity for which he sues; *Dickerman v. Northern Trust Co.* 176 U. S. 181, 44 L. ed. 423, 20 Sup.

Ct. Rep. 311, holding that fact that corporation was organized in pursuance of fraudulent scheme to defraud certain stockholders, is no defense to foreclosure of mortgage, held by innocent party; *Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 168; *Guardian Trust Co. v. White Cliffs Portland Cement & Chalk Co.* 109 Fed. 523; *Farmers' Loan & T. Co. v. Louisville, N. A. & C. R. Co.* 103 Fed. 110,—holding that if debt secured by mortgage be justly due, it is no defense to foreclosure that mortgagee was animated by hostility or other bad motive; *Ritchie v. McMullen*, 25 C. C. A. 50, 47 U. S. App. 470, 79 Fed. 522, holding that purpose of parties in bringing on litigation cannot, if their rights are clear, affect duty of court to grant relief asked; *Chicago v. Union Stock Yards & Transit Co.* 164 Ill. 224, 35 L.R.A. 281, 45 N. E. 430, holding that corporation cannot be denied relief in equity because of ultra vires acts in relation to subject matter of litigation, under maxim that party coming into equity must come with clean hands; *Func v. Farmers' Elevator Co.* 142 Iowa, 621, 24 L.R.A.(N.S.) 108, 121 N. W. 53 (dissenting opinion), on improper motive as affecting right to enforce legal demand; *Weir v. Jones*, 84 Miss. 602, 36 So. 533, holding that if beneficiary in deed of trust had right to have it foreclosed, fact that it was foreclosed as result of agreement with junior encumbrancer in no way affects its validity; *Peters v. Case*, 62 W. Va. 33, 13 L.R.A.(N.S.) 408, 57 S. E. 733, holding mere general iniquitous conduct, unconnected with the matter in the suit, is not sufficient; *Beekman v. Marsters*, 195 Mass. 205, 11 L.R.A.(N.S.) 201, 122 Am. St. Rep. 232, 80 N. E. 817, 11 Ann. Cas. 332, holding it is only with regard to the plaintiff's rights against the defendant that the plaintiff must come into court with clean hands; *McMullen v. Ritchie*, 64 Fed. 253, holding it no defense to a legal demand, that the complainant is actuated by personal or improper motives.

Motive of gift as affecting its validity.

Cited in *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. ed. 448, 24 Sup. Ct. Rep. 269, holding that motive of gift does not affect its validity.

When costs and expenses of defending suit are recoverable against person really liable.

Cited in *Duxbury v. Vermont C. R. Co.* 26 Vt. 751, holding that where town had remedy against railroad corporation for damages paid for defect in road built by corporation, town might also recover of corporation costs and expenses incurred in defending suit against it for such damages.

21 E. R. C. 622, *ELLESMERE BREWERY CO. v. COOPER*, 65 L. J. Q. B. N. S. 173, 73 L. T. N. S. 567, [1896] 1 Q. B. 75, 44 Week. Rep. 254.

Proportionate liability of sureties.

Cited in *Re Denton* [1903] 2 Ch. 670, 72 L. J. Ch. N. S. 732, 89 L. T. N. S. 62, 52 Week. Rep. 93, holding the proportion in which sureties are liable to contribute is that of the amount for which they were respectively liable.

Vitiating of instrument by alteration.

Cited in *Canada Furniture Co. v. Stephenson*, 19 Manitoba L. Rep. 618, holding that if joint and several guaranty is altered by inserting name of additional creditor, such alteration vitiates instrument.

Liability of signer of note as maker.

Cited in *Kinnard v. Tewsley*, 27 Ont. Rep. 398, holding that where note commences "I promise to pay" and is signed by two makers, and afterwards discounted by plaintiff for holder thereof on his agreeing to become responsible for

payment of note, he signing under names of other makers, he was liable as maker of new note.

21 E. R. C. 632, *DAVIES v. HUMPHREYS*, 4 Jur. 250, 9 L. J. Exch. N. S. 263, 6 Mees. & W. 153.

Accrual of right to contribution.

Cited in *Preston v. Fitch*, 137 N. Y. 41, 33 N. E. 77; *Tobias v. Rogers*, 13 N. Y. 59.—holding that right of surety to contribution arises from payment of demand against principal; *Strong v. Mitchell*, 19 Vt. 644, holding where a co-surety is compelled to pay the note his right to contribution dates from such payment; *Burrus v. Cook*, 215 Mo. 496, 114 S. W. 1065, holding it begins to run from the day of surety's payment; *Hooper v. Hooper*, 81 Md. 155, 48 Am. St. Rep. 496, 31 Atl. 508, holding where debt was not barred right to contribution accrued when the coguarantor paid it.

Cited in *Stearns, Suretyship*, 522, as to when contribution between cosureties may be enforced.

Distinguished in *Wolmershausen v. Gullick*, 12 E. R. C. 823, 62 L. J. Ch. N. S. 773, [1893] 2 Ch. 514, 68 L. T. N. S. 753, holding the right to contribution after judgment and before payment exists and is enforceable in equity.

—As affected by amount paid.

Cited in *Magruder v. Admire*, 4 Mo. App. 133, holding it does not accrue until he has paid in excess of his proportionate share of liability; *Tobias v. Rogers*, 13 N. Y. 59, holding no assumption arises until the cosurety has paid more than his proportion; *Ex parte Snowden*, L. R. 17 Ch. Div. 44, 50 L. J. Ch. N. S. 540, 44 L. T. N. S. 830, 29 Week. Rep. 654, holding the claim arises when he has paid more than half of the whole of the debt due to the creditor; *Cameron v. Boulton*, 9 U. C. C. P. 537, holding as soon as one of three sureties paid more than one-third of original debt his right to contribution arose.

Cited in 1 *Brandt, Suretyship*, 3d ed. 597, as to when surety who has paid less than his share of debt cannot recover contribution; *Keener, Quasi-Contr.* 407, on surety's lack of right to contribution before payment of more than his proportionate share.

—As affecting limitations.

Cited in *Goodrich v. Leland*, 18 Mich. 110, holding mortgagor's cause of action would arise from time of payment made on redemption, and statute would begin to run from that time; *Brady v. Brady*, 110 Md. 656, 73 Atl. 567, holding that when one joint maker of note pays debt before it is barred by statute, statute begins to run against his right to contribution from date of such payment; *Bushnell v. Bushnell*, 77 Wis. 435, 9 L.R.A. 411, 46 N. W. 422, holding the right of action upon the liability of cosurety is limited to six years from the time he pays the creditor more than his proportion of the debt; *Burrus v. Cook*, 117 Mo. App. 385, 93 S. W. 888 (dissenting opinion), on period of limitation of action against surety.

Cited in notes in 18 L.R.A.(N.S.) 585, as to when statute commences to run to bar action by surety against cosurety for contribution; 16 E. R. C. 158, as to when limitations begin to run on note or check.

Cited in 1 *Brandt, Suretyship*, 3d ed. 606, as to when claim for contribution is barred by limitation.

— Instruments creating obligation.

Cited in *Byers v. Alcorn*, 6 Ill. App. 39, holding it immaterial whether the sureties are all liable upon the same or upon different instruments.

Amount recoverable as contribution.

Cited in *Garfield v. Foskett*, 57 Vt. 290, holding a recovery could be had as contribution of the excess above the half the surety was bound to pay; *Lytle v. Pope*, 11 B. Mon. 297, holding the claim should be allowed only to the extent that payment exceeds surety's proportion of the entire debt.

Payment raising right to contribution.

Cited in *Davis v. Bauer*, 41 Ohio St. 257, holding the payment must have been made under a legal and fixed obligation to establish a claim for contribution; *Waggoner v. Walrath*, 24 Hun, 443, holding a surety not liable for contribution when discharge of a cosurety comes from act or neglect of the creditor.

Enforcement of contribution at law.

Cited in *Rindge v. Baker*, 57 N. Y. 209, 15 Am. Rep. 475, on assumption of jurisdiction over contribution by law courts; *Norton v. Coons*, 3 Denio, 130, holding law courts have borrowed their jurisdiction from courts of equity.

— Form of action.

Cited in *Love v. Gibson*, 2 Fla. 598, holding an action of assumption for money paid is a proper action for contribution.

Liability of principal to surety.

Cited in 1 Brandt, *Suretyship*, 3d ed. 460, on right of surety who pays debt to sue principal in assumpsit; 1 Brandt, *Suretyship*, 3d ed. 458, on right of surety to pay by instalments and sue principal for each instalment.

Running of limitations as between principal and surety.

Cited in 1 Brandt, *Suretyship*, 3d ed. 500, on running of limitations as between surety and principal.

Rule governing evidence of admissions.

Cited in *Campbell v. James*, 17 Blatchf. 42, Fed. Cas. No. 2,361, holding a letter as evidence of an admission admissible as well as to those parts in favor of, as to those against party; *Smith v. Moore*, 142 N. C. 277, 7 L.R.A.(N.S.) 684, 55 S. E. 275, holding declarations against interest by one since deceased, whether oral or written, are admissible where he appeared to have had knowledge of facts declared; *Livingston v. Arnoux*, 56 N. Y. 507, holding a receipt by an officer thereby charging himself with money and rendering himself accountable to the creditor, admissible in evidence; *Wyman v. Farnsworth*, 3 Barb. 369, on endorsements on a note as evidence of money paid; *Ganton v. Size*, 22 U. C. Q. B. 473, holding that if entry is admitted as being against interest it carries with it whole statement; *Ganton v. Size*, 2 U. C. Err. & App. 368 (as commented upon in *Doe v. Reviss*, 7 C. B. 514), on admissibility of entries against interest.

Inference drawn from payment.

Cited in *Martin v. Barnes*, 5 N. S. 291, on payment of interest on mortgage as indicating way parties treated document as deed.

21 E. R. C. 634. *WOLMERSHAUSEN v. GULLICK* [1893] 2 Ch. 514, 62 L. J. Ch. N. S. 773, 68 L. T. N. S. 753, 9 Times L. R. 437.

See S. C. 12 E. R. C. 823.

21 E. R. C. 636, *CRAYTHORNE v. SWINBURNE*, 9 Revised Rep. 264, 14 Ves. Jr. 160.

Doctrine of contribution.

Cited in *Cameron v. Boulton*, 9 U. C. C. P. 537; *Lanson v. Paxton*, 22 U. C. C. P. 505,—on the general law of contribution.

Cited in note in 21 E. R. C. 630, on right to contribution between co-sureties.

Cited in *Stearns, Suretyship*, 512, on contribution between cosureties.

— Parties bound.

Cited in *Brownlow v. Wollard*, 66 Mo. App. 636, holding the parties having assumed the relation of cosureties, were, by the common law, bound by an implied promise to each other, to contribute in case of unequal payment; *Wolmerhausen v. Gullick*, 12 E. R. C. 823, 62 L. J. Ch. N. S. 773, [1893] 2 Ch. 514, 68 L. T. N. S. 753, holding a surety against whom the creditor has secured a judgment may be action to compel a cosurety to contribute his due share; *Aspinwall v. Saechi*, 57 N. Y. 331, holding a corporation stockholder compelled to pay a debt of corporation due to failure of officers to comply with the law, may compel a contribution by the other stock holders.

Basis of contribution among co-sureties.

Cited in *Macey v. Childress*, 2 Tenn. Ch. 438, on the grounds supporting right to contribution; *Forster v. Ivey*, 2 Ont. L. Rep. 480 (dissenting opinion), on foundation of doctrine of contribution; *Trust & Loan Co. v. Wurtete*, 35 Can. S. C. 663, on foundation of right of surety to contribution; *Ianson v. Paxton*, 23 U. C. C. P. 439; *R. v. Pringle*, 32 U. C. Q. B. 308; *Ward v. National Bank, L. R. 8 App. Cas. 755*, 52 L. J. P. C. N. S. 65, 49 L. T. N. S. 315; *Davies v. Humphreys*, 21 E. R. C. 632, 4 Jur. 250, 9 L. J. Exch. N. S. 265, 6 Mees. & W. 153; *Brahan v. Ragland*, 3 Stew. (Ala.) 247; *Fitzpatrick v. Hill*, 9 Ala. 783; *Bezzell v. White*, 13 Ala. 422; *Drummond v. Yager*, 10 Ill. App. 380; *Hohn v. Shideler*, 164 Ind. 242, 72 N. E. 575; *Crow v. Vance*, 4 Iowa, 434; *Gage v. Gage*, 66 N. H. 282, 28 L.R.A. 829, 29 Atl. 543; *Campbell v. Mesier*, 4 Johns. Ch. 334, 8 Am. Dec. 570; *Mathews v. Aikin*, 1 N. Y. 595; *Wells v. Miller*, 66 N. Y. 255; *Reid v. King*, 158 N. C. 85, 73 S. E. 168; *Hartwell v. Smith*, 15 Ohio St. 200; *Crouse v. Wagner*, 41 Ohio St. 470; *Kennedy v. Carpenter*, 2 Whart. 344; *Tarr v. Ravenscroft*, 12 Gratt. 642; *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230; *Strother v. Mitchell*, 80 Va. 149,—holding the doctrine of contribution among sureties is founded on principles of equity and natural justice rather than on contract; *Hayes v. Ward*, 4 Johns. Ch. 123; *Merchants' Bank v. McKay*, 15 Can. S. C. 672; *State use of Wolff v. Berning*, 74 Mo. 87; *Henderson v. McDuffee*, 5 N. H. 38, 20 Am. Dec. 557,—holding the rule is founded upon fixed principles of natural justice; *Sharp v. Cheatham*, 88 Mo. 498, 57 Am. Rep. 433, holding it is bottomed and fixed on general principles of justice; *Wolff v. Schaeffer*, 4 Mo. App. 367, holding it arises from equitable considerations growing out of the relation of suretyship; *Kennedy v. Carpenter*, 2 Whart. 344, holding that right of contribution may be created by express contract, where, without it, right could not exist; *Menzies v. Kennedy*, 23 Grant, Ch. (U. C.) 360, holding the right depends on the maxim that equality is equity; *Pauline v. Kaighn*, 27 N. J. L. 503, holding when the action is brought for indemnity or contribution, the instrument is not the foundation of the recovery; *London v. Citizens Ins. Co.* 13 Ont. Rep. 713; *Duncan, F. & Co. v. North & South Wales Bank*, 4 E. R. C. 591, L. R. 6 App. Cas. 1-23, 50 L. J. Ch. N. S. 355, 43 L. T. N. S. 706, 29 Week. Rep. 763,—holding the liability to contribution is independent of any contract between the parties; *West v. Chasten*, 12 Fla. 315, holding inde-

pendent of anything arising from the express contract, courts of equity give relief: *Oldham v. Broom*, 28 Ohio St. 41, holding, for this reason, where one pays more than his share, he may compel contribution from the others as cosureties; *Barry v. Ransom*, 12 N. Y. 462, holding though the several sureties are ignorant of the engagements of each other they are nevertheless liable to contribute; *Rosenbaum v. Goodman*, 78 Va. 121, holding all that is necessary to support doctrine is that sureties are bound for the same principal and by the same engagement; *Eberhardt v. Wood*, 2 Tenn. Ch. 488, holding the surety's equity for contribution grows out of his right to be subrogated to the rights of the creditor so far as it may be necessary for his protection; *Brewer v. Franklin Mills*, 42 N. H. 292, holding if they are bound for payment of the same debt, for the same debtor, to the same creditor, they are, as to the subrogation of the creditor's collateral securities, to be regarded as sureties; *Ayer v. Tilton*, 42 N. H. 407, holding the obligation to contribute is not founded on contract, except, so far as an assumpsit may be inferred from knowledge of principle of justice which requires sureties to bear burden equally; *Becker v. Farwell*, 25 Ill. App. 432, holding persons acting under circumstances to which contribution applies, are said to act under the head of contract implied; *Chipman v. Morrill*, 20 Cal. 131, holding courts of common law proceed on the principle that there was an implied promise on part of each surety to make up the common loss; *Atlantic Coast Brewing Co. v. Donnelly*, 59 N. J. L. 48, 35 Atl. 647, holding the right is not only a principle of equity, but inheres also at law in the contract itself; *McCullum v. Boughton*, 132 Mo. 601, 35 L.R.A. 480, 33 S. W. 476, holding the test of liability is the intention of the parties as shown by their agreements; *Agnew v. Bell*, 4 Watts, 31; *Baily's Estate*, 156 Pa. 634, 22 L.R.A. 444, 27 Atl. 560, 33 W. N. C. 89,—holding it may well be considered as resting alike on both equity and contract for its foundation.

Cited in note in 68 L.R.A. 524, 529, 530, 542, 564, on extinction of judgments against principals by sureties' payment.

Contract as limiting surety's liability to contribute.

Cited in *Wright v. Garlinghouse*, 26 N. Y. 539 (dissenting opinion), on right of surety to qualify extent of his liability; *Mitchell v. English*, 17 Grant, Ch. (U. C.) 303, holding the surety may by contract limit his liability; *Farmers' Bank v. Vanmeter*, 4 Rand. (Va.) 553, holding sureties may bind themselves severally in succession; so that each may be supplemental surety, in respect to another.

—Sureties bound by separate instruments.

Cited in *Cross v. Searboro*, 6 Baxt. 134, holding it not necessary that both parties be bound by the same instrument; *Norton v. Coons*, 3 Denio, 130, holding the right to contribution exists though they become sureties for the debt at different times and by different instruments; *Bell v. Jasper*, 37 N. C. (2 Fred. Eq.) 597, holding the right of contribution, when principal is insolvent, exists whether they are sureties by the same or by separate instruments; *Langford v. Perrin*, 5 Leigh, 552, holding the surety entitled to relief, whether bound by the same or by several instruments, provided always it is for payment of the same debt or performance of same duty; *Daniel v. McRae*, 9 N. C. (2 Hawks) 590, 11 Am. Dec. 787, holding same though they be sureties by different instruments, executed at different times, and without communication or mutual understanding to that effect; *Keith v. Goodwin*, 31 Vt. 268, 73 Am. Dec. 345, holding one guarantying the same debt though signing another instrument may

claim contribution from one signing as principal but who was known to be a mere surety.

Distinguished in *Odom v. Owen*, 2 Baxt. 446, holding where two bonds are given for performance of same duty and to same party, the sureties are liable to contribution equally.

— Exoneration of supplementary sureties.

Cited in *Monson v. Drakeley*, 40 Conn. 552, 16 Am. Rep. 74, holding a supplemental surety to principal and sureties on original undertaking is not liable to contribution; *Hunt v. Chambliss*, 7 Smedes & M. 532, holding an original surety who pays a note which had been extended in time at request of principal and sureties cannot hold one for contribution who signs as surety to enable original parties to secure the extension; *Bulkeley v. House*, 62 Conn. 459, 21 L.R.A. 247, 26 Atl. 352, holding one signing a note at request of principal and sureties to enable principal to procure money on same is not liable to the original sureties for contribution; *Benedict v. Hecox*, 18 Wend. 496, holding one signing a second note as surety became thereby a surety for the sureties on the first note and was by the payment of debt by the first sureties entirely relieved from liability; *Adams v. Flanagan*, 36 Vt. 400, holding where sureties signed note upon express understanding with principal and payee that they signed as sureties for and not with the sureties already bound they cannot be held to contribution; *Thompson v. Taylor*, 12 R. I. 109, holding where evidence fairly tends to show a subsequent indorser intended to become liable only in case of default in payment by maker and prior sureties, he is entitled to indemnity from contribution; *Salvers v. Ross*, 15 Ind. 130, holding sureties on a bond for faithful application of money obtained from sale of land by the administrator, is not a cosurety and liable to contribution with those on a bond conditioned upon the faithful performance of every duty enjoined upon the administrator; *Jones v. Shorter*, 1 Ga. 294, 44 Am. Dec. 649, holding where there are two bonds and one is intended to be subsidiary to and a security for the other, the sureties on the two bonds are not cosureties so as to be liable to contribution; *Harrison v. Lane*, 5 Leigh, 414, 27 Am. Dec. 607, holding sureties on a second bond, collateral and supplemental, obliging themselves to pay if the principal and sureties on first bond fail, can be held only to the extent they have contracted; *Re Danton* [1904] 2 Ch. 178, 75 L. J. Ch. N. S. 465, 90 L. T. N. S. 698, 52 Week. Rep. 484, holding one whose contract is that of guarantor against default of both the mortgagor and surety is not liable for contribution at suit of surety; *Cutter v. Emery*, 37 N. H. 567, holding if two persons sign the same obligation as sureties for a third but one signs at the request of the first surety, they are not cosureties as between themselves; *Flint v. Day*, 9 Vt. 345, on a collateral guaranty as protection from contribution.

Subrogation of surety to remedies of creditor.

Cited in *Foster v. Athenaeum*, 3 Ala. 302; *Lyon v. Bolling*, 9 Ala. 463, 44 Am. Dec. 444; *State Bank v. Fowler*, 22 Ark. 112; *Dennis v. Rider*, 2 McLean, 451, Fed. Cas. No. 3,797,—holding the surety on payment of the debt is entitled to be substituted to all rights of the creditor; *Cullum v. Emanuel*, 1 Ala. 23, 34 Am. Dec. 757; *Tompkins v. Mitchell*, 2 Rand. (Va.) 428,—holding the surety is entitled to every remedy which the creditor has against the principal debtor, to enforce every security; *Salmon v. Clagett*, 3 Bland, Ch. 25 (affirmed in 5 Gill & J. 314), holding that surety has, upon payment, a right to be subrogated to the rights of the creditor and receive an assignment of creditors' additional securities; *Goodyear v. Watson*, 14 Barb. 481, holding payment by the surety

does not extinguish a judgment as against the principal, but the surety may take an assignment to himself and enforce payment; *Cornwell's Appeal*, 7 Watts & S. 305, holding if the creditor obtains any additional security subsequently from the principal debtor, the original surety upon payment is entitled to the benefit of the additional security; *Mankey v. Willoughby*, 21 App. D. C. 314, holding the surety is entitled to have the security in the same plight and condition in which it stood in the creditor's hands; *Rigney v. Vanzandt*, 5 Grant, Ch. (U. C.) 494; *Lumpkin v. Mills*, 4 Ga. 343,—holding upon payment he is entitled to stand in the creditor's place as to all original evidences of the debt; *Dunlap v. Clements*, 7 Ala. 539, holding any security which the creditor may resort to he may be compelled to use for the benefit of the surety of the debtor; *Clagett v. Salmon*, 5 Gill. & J. 314, holding that a surety who pays the debt is entitled to be subrogated to the creditor's rights, including an assignment of creditor's securities; *Maybee v. Bank of Toronto*, 29 U. C. Q. B. 566, holding on payment of balance on note by surety he became entitled to an assignment and delivery of the securities held by the satisfied creditor; *Molsons Bank v. Heilig*, 25 Ont. Rep. 503, holding the surety upon payment of balance of indebtedness entitled to a pro rata share of value of security still in hands of creditors; *New London Bank v. Lee*, 11 Conn. 112, 27 Am. Dec. 713, holding the rule applies as well where security consists of personal as well as real estate; *Sherwood v. Bank of British N. A.* 3 Grant, Ch. (U. C.) 457 (in opinion of chancellor), on right of surety to securities held by creditor; *Fuller v. Loring*, 42 Me. 481 (dissenting opinion), on right of surety to remedies of creditor; *Rosenbaum v. Goodman*, 78 Va. 121, holding the payment of debt of principal entitled the surety to be subrogated to all collateral securities which the creditor had obtained.

Status and liability of sureties.

Cited in *Harris v. Jones*, 23 N. D. 488, 136 N. W. 1080, holding that one who refused to sign note as surety until after other surety would sign with knowledge of latter, no right of contribution exists; *Morrow v. Morrow*, 2 Tenn. Ch. 549, holding the liability of the principal to the surety is a debt or obligation dating from the execution of the instrument although contingent upon payment by surety; *Eberhardt v. Wood*, 2 Tenn. Ch. 488, holding the liability of sureties of an administratrix dates from execution of bond and becomes fixed upon the default of such administratrix.

Cited in note in 21 L.R.A. 247, 250, on law as to becoming surety for surety-maker.

Cited in *Stearns, Suretyship*, 517, on nonliability to contribution of surety for a surety.

Adjustment of equities between sureties.

Cited in *Griffin v. Kelleher*, 132 Mass. 82, holding that, where a surety has paid whole debt he can recover no more than an aliquot part; *Snow v. Brown*, 100 Ga. 117, 28 S. E. 77, holding it immaterial that sureties are bound in different sums, except that contribution could not be required beyond the sum for which they are respectively bound; *Waters v. Riley*, 2 Harr. & G. 305, 18 Am. Dec. 302 (dissenting opinion), on contribution as extending to liability under different instruments; *Malone v. Stewart*, 235 Pa. 99, 83 Atl. 607, 18 Pa. Dist. R. 905, holding that where several persons are sureties on separate bonds and for varying amounts, for completion of building, and not compelled to complete building left unfinished by contractor they are compellable to contribute in proportion to amount of respective bonds; *Fidelity & D. Co. v.*

Phillips, 235 Pa. 469, 84 Atl. 432, holding that where sureties are bound by different sums in different instruments, they are liable in proportion to penal sums in respective bonds; *McMahon v. Fawcett*, 2 Rand. (Va.) 514, 14 Am. Dec. 796, holding the principal cannot, by conveyance of property to indemnify some of the sureties, deprive the others of their rights, but the trust property will extend to all the sureties.

Disapproved in *Ellsworth v. Lockwood*, 42 N. Y. 89, holding the surety upon payment of the debt is entitled to an assignment or effectual transfer of the debt, and of the bond or other instrument evidencing the debt; *Smith v. Rumsey*, 33 Mich. 183, holding payment of judgment by sureties will not destroy the debt as between them and a cosurety, but equity will consider it alive to the extent of compelling contribution.

— Procedure and remedies.

Cited in *Bunting v. Riehl*, 2 Pa. Co. Ct. 450; *Hoyt v. Tuthill*, 33 Hun, 196,—holding where the sureties are numerous they may be joined in equity to prevent multiplicity of suits; *Croft v. Moore*, 9 Watts, 451, holding the difficulties attending separate actions where the contributors are numerous, may be avoided by substituting the surety for the creditor; *Watkins v. Worthington*, 2 Bland, Ch. 509, holding where parties are all before the court, after awarding the creditor full satisfaction the court will adjust these equities so the sureties shall contribute a due proportion; *Abbot v. Johnson*, 32 N. H. 9, holding if several sureties pay the debt of the principal, each in separate payments, they may join in one bill against a cosurety for contribution.

Order of liability on a note.

Cited in *Post v. Tradesmen's Bank*, 28 Conn. 420, holding in absence of agreement to the contrary, parties to a note are liable to each other in the order in which their names stand on the paper.

Distinguished in *Pitkin v. Flanagan*, 23 Vt. 160, 56 Am. Dec. 61, holding the mere order of indorsement by accommodation indorsers who sign before paper is put into circulation raises no presumption of right to indemnity against prior indorsers.

— Actions available.

Cited in *Farwell v. Ensign*, 66 Mich. 600, 33 N. W. 734, on right to turn action begun as against prior indorsers into one for contribution.

Admissibility of parol evidence to show relation as between parties.

Cited in *Wilder v. Butterfield*, 50 How. Pr. 385, holding in equity parol evidence may be given to show the real relation which parties to an instrument sustain to each other; *Paul v. Berry*, 78 Ill. 158; *Houck v. Graham*, 106 Ind. 195, 55 Am. Rep. 727, 6 N. E. 594,—holding the relation of the parties liable upon a promissory note to each other may be shown by parol testimony; *Bowen v. Darby*, 14 Fla. 202, holding in equity parol evidence is admissible to show who is principal and who surety; *Sherman v. Black*, 49 Vt. 198, holding testimony aliunde admissible to show one signed as surety for, and not as cosurety with a defendant; *Smith v. Doak*, 3 Tex. 215, holding in an action between payee and makers of some instrument parol evidence is admissible to show one of makers signed as surety; *Tennessee Hospital v. Fuqua*, 1 Lea, 608, holding although the sureties are bound for the same principal, and the same liability, yet it may be shown one was collateral to the other; *Field v. Pelot*, 11 Mich. Eq. 369, holding parol evidence admissible to show surety on a second bond was intended only to guaranty the solvency of the first sureties; *Whitehouse v. Hanson*, 42 N. H. 9, holding those who appear as sureties may be

shown to have become surety at the request of another, under such circumstances as to relieve them from any liability for contribution; *Bowser v. Rendell*, 31 Ind. 128, holding where one surety enters into the original contract at the request of the others, this agreement whether express or implied may be shown by parol evidence; *Claybrook v. Scott*, 1 Va. Dec. 316, holding parol evidence admissible to show what the contract was, out of which the alleged liability to contribution arises; *Harper v. Knowlson*, 2 U. C. Err. & App. 253; *McCrea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103,—on admissibility of parol evidence to show contract; *Currier v. Currier*, 2 N. H. 75, 9 Am. Dec. 43, on parole evidence admissible to explain contract.

Cited in note in 20 L.R.A. 712, on extrinsic evidence to show who is liable as maker of note.

Distinguished in *Norton v. Coons*, 6 N. Y. 33, holding after relation of principal and surety is established, the surety cannot by extrinsic facts show a parol agreement varying the operation of his contract.

21 E. R. C. 646, *BANK OF IRELAND v. BERESFORD*, 6 Dow, P. C. 233, 19 Revised Rep. 50.

Discharge of secondary liability by conduct of creditor.

Cited in *Boston Hat Manufactory v. Messinger*, 2 Pick. 223, holding if the transaction be materially changed so the risk is increased without the surety's consent equity will exonerate from liability.

Cited in note in 39 L. ed. U. S. 579, on restraining proceedings at law.

—Laches.

Cited in *Pipkin v. Bond*, 40 N. C. (5 Ired. Eq.) 91, holding while the creditor is not bound to diligence, he is bound not to increase the risk of the surety by any act of his; *Walker v. Goldsmith*, 7 Or. 161, holding if there be a stipulation that the creditor is to sue the debtor without delay upon default, passiveness will discharge the surety; *Molson's Bank v. McDonald*, 40 U. C. Q. B. 529, on discharge of acceptor of bill by act of holder.

Distinguished in *Monroe County v. Otis*, 62 N. Y. 88, holding mere laches will not discharge surety, but the neglect must be of a positive duty.

—Extension of time.

Cited in *Cameron v. Boulton*, 9 U. C. C. P. 537, on release of sureties by extending time of payment; *Leavitt v. Savage*, 16 Me. 72, holding a surety on a sealed instrument may be discharged by a parol agreement giving time to the principal; *Davidson v. Bartlett*, 1 U. C. Q. B. 50, holding the defense of surety and discharge by reason of giving time to principal without his knowledge or consent is not available to one appearing on a note as joint maker; *Bank of Montgomery County v. Walker*, 9 Serg. & R. 229, 11 Am. Dec. 709, holding time given to the indorser by the holder after day of payment does not affect liability of maker, though note was for accommodation of the indorser.

Equities of surety.

Cited in *La Farge v. Herter*, 11 Barb. 159, holding equity will recognize and protect the relation and rights of the surety after as well as before judgment.

Liability of accommodation acceptor of bill.

Cited in *Niles v. Porter*, 6 Blackf. 44, holding the acceptor of a bill for accommodation of the drawer is liable to a bona fide holder for value, though the latter took it knowing that the acceptance was without consideration; *Farmers' & M. Bank v. Rathbone*, 26 Vt. 19, 58 Am. Dec. 200, holding the rule that a

release of the drawer, by the holder of a bill has no effect on the liability of the acceptor is the same in law as in equity, though the holder subsequently learns the bill was for accommodation.

Parol discharge of written obligation.

Cited in *McPherson v. Dickson*, 8 U. C. Q. B. 29, holding one under covenant to repay advances made on a specified date if sales are not made before that date, has no defense at law from fact of a parol agreement of discharge.

21 E. R. C. 650, *ROUSE v. BRADFORD BKG. CO.* [1894] A. C. 586, 63 L. J. Ch. N. S. 890, 71 L. T. N. S. 522, 43 Week. Rep. 78, 6 Rep. 349, affirming the decision of the Court of Appeal, reported in [1894] 2 Ch. 32, 63 L. J. Ch. N. S. 337, 70 L. T. N. S. 427, 7 Rep. 127.

Discharge of surety by extension of time.

Cited in *Franklin Sav. Bank v. Cochrane*, 182 Mass. 586, 61 L.R.A. 760, 66 N. E. 200, holding a director of a corporation who signs a mortgage note as surety is discharged by extension of time of payment by treasurer of corporation without his knowledge or consent; *Canada Permanent Loan & Sav. Co. v. Ball*, 30 Ont. Rep. 557, holding a retired trustee under a mortgage became a surety and by changing the nature and time of payment of mortgage he was discharged; *Forster v. Ivey*, 32 Ont. Rep. 175, holding that relations which exist among mortgagor, mortgagee, and assignee of land who agreed to pay mortgage, are not those which obtain among creditor, surety and principal debtor and arrangement as to extension of time does not work release.

The decision of the Court of Appeals was cited in *McLaughlin Carriage Co. v. Oland*, 34 N. S. 193, holding where liability of the surety had not accrued at time when time was given he suffered no detriment and was not discharged.

—By release of principal debtor.

The decision of the Court of Appeals was cited in *Allison v. McDonald*, 23 Can. S. C. 635, holding a retired member of a partnership released from liability on a note by a release of the member continuing the business after notice of the dissolution.

Creditor's duty to regard suretyship.

Cited in *Forster v. Ivey*, 2 Ont. L. Rep. 480, holding a creditor is bound to regard a suretyship which comes to his knowledge, although it may have arisen after the debt has been contracted; *Stone v. Rossland Ice & Fuel Co.* 12 B. C. 66, holding where creditor has notice of an arrangement between debtors that one shall be liable only as surety, he must do nothing to the prejudice of such surety; *Schwartz v. Bielschowsky*, 21 Manitoba L. Rep. 310, holding that where one of two joint debtors furnished other with money to pay his half of debt, his position as to balance does not become merely that of surety for other, unless creditor knew of facts.

The decision of the Court of Appeals was cited in *Wilson v. Land Secur. Co.* 26 Can. S. C. 149, holding upon assignment of benefits of a contract and notice of the relation of the parties as principal surety and creditor, nothing could be done to prejudice of interests of surety.

Note of one joint debtor as releasing co-debtor.

The decision of the Court of Appeal was cited in *Gurney v. Braden*, 3 B. C. 474, holding that note of one joint debtor does not in absence of agreement release codebtor.

Effect of assumption of debts after dissolution of partnership.

Cited in note in 9 L.R.A.(N.S.) 88, 91, 92, on assumption of debts on dissolution of partnership.

21 E. R. C. 664, *COULTHART v. CLEMENTSON*, 49 L. J. Q. B. N. S. 204, 41 L. T. N. S. 798, L. R. 5 Q. B. Div. 42, 28 Week. Rep. 355.

Effect on guaranty of death of guarantor or guarantee.

Cited in *Fewlass v. Keeshan*, 32 C. C. A. 8, 60 U. S. App. 133, 88 Fed. 573, holding that contract is not terminated by death of surety on cost bond, and his estate is bound for costs thereafter accruing; *Hyland v. Habieh*, 150 Mass. 112, 6 L.R.A. 383, 15 Am. St. Rep. 174, 22 N. E. 765, holding that death of mortgagor revokes authority to sell goods to third person on security of mortgage given in part to secure indebtedness on part of third person expected to arise from future sales to him by mortgagee; *Hard v. Mingle*, 206 N. Y. 179, 42 L.R.A.(N.S.) 1131, 99 N. E. 542, on the point that where a guarantor of a note died before maturity thereof, and the holder had notice thereof his estate was not liable; *Kernochan v. Murray*, 111 N. Y. 306, 2 L.R.A. 183, 7 Am. St. Rep. 744, 18 N. E. 868, holding that guaranty of certain per cent per annum in dividends so long as purchaser should retain stock sold him, is not limited to life of sellers and promisors; *National Eagle Bank v. Hunt*, 16 R. I. 148, 13 Atl. 115, holding that a guaranty is determined by death of the guarantor and notice thereof; *Starrs v. Cosgrove Brewing & Malting Co.* 12 Can. S. C. 571 (reversing 11 Ont. App. Rep. 156), holding that death of member of firm secured by continuing guaranty for goods sold to G, put end to guaranty; *Exchange Bank v. Springer*, 13 Ont. App. Rep. 390, holding that knowledge of death of surety on bank cashier's bond does not relieve his estate from liability upon bond; *Re Crace* [1902] 1 Ch. 733, 2 B. R. C. 929, holding that where bond is given by surety for integrity of person in consideration of that person's being appointed to office by obligee of bond, liability of surety will not be determined by his death.

Cited in note in 2 Brit. Rul. Cas. 941, 942, on determination of liability of guarantor or surety by his death.

Cited in 1 Beach, Contr. 60, on lapsing of offer by death before acceptance; 1 Brandt, Suretyship, 3d ed. 316, 317, as to when death of guarantor revokes guaranty; 1 Brandt, Suretyship, 3d ed. 313, on effect of death of guarantor to revoke guaranty.

Distinguished in *Lloyd v. Harper*, L. R. 16 Ch. Div. 290, 50 L. J. Ch. N. S. 140, 43 L. T. N. S. 481, 29 Week. Rep. 492, 1 Eng. Rul. Cas. 686, holding the death of a father, who guarantees his son's responsibility as a member of Lloyd's, does not terminate the guaranty though notice be given, but his estate is liable; *Beckett v. Addyman*, L. R. 9 Q. B. Div. 783, 51 L. J. Q. B. N. S. 597, holding that a surety is not necessarily discharged from continuing liability by death of cosurety.

Disapproved in *Balfour v. Crace* [1902] 1 Ch. 733, 71 L. J. Ch. N. S. 358, 86 L. T. N. S. 144, 18 Times L. R. 321, on effect to be given notice of death of guarantor; *Re Silvester* [1895] 1 Ch. 573, 64 L. J. Ch. N. S. 390, 72 L. T. N. S. 283, 43 Week. Rep. 443, 13 Reports, 448, holding one entitled to the benefits of a contract of guaranty and who has notice of guarantor's death, is not bound to assume that prima facie it would be a breach of trust on part of executor not to give notice to determine the liability.

Right to revoke guaranty.

Cited in *Gay v. Ward*, 67 Conn. 147, 32 L.R.A. 818, 34 Atl. 1025, holding that guarantor may, upon notice, revoke or terminate contract of continuing guaranty, unless such right is excluded by terms of contract.

Cited in *Stearns, Suretyship*, 94, on revocation of guaranty.

When offer can be withdrawn.

Cited in *Benjamin, Sales*, 5th ed. 70, as to when offer can be withdrawn.

21 E. R. C. 672, *STURLA v. FRECCIA*, L. R. 5 App. Cas. 623, 50 L. J. Ch. N. S. 86, 43 L. T. N. S. 209, 29 Week. Rep. 217, 44 J. P. 812, affirming the decision of the Vice Chancellor, reported in 49 L. J. Ch. N. S. 41, L. R. 12 Ch. Div. 411.

Official records as evidence.

Cited in *Mercer v. Denne* [1904] 2 Ch. 534, 68 J. P. 479, [1905] 2 Ch. 538, 74 L. J. Ch. N. S. 723, 93 L. T. N. S. 412, 21 Times L. R. 760, 70 J. P. 65, 54 Week. Rep. 303, 3 Local G. R. 1293, holding reports, maps and plans prepared for the use of a department of the government are not admissible in evidence as public documents; *Evans v. Merthyr Tydfil Urban Dist.* [1899] 1 Ch. 241, 68 L. J. Ch. N. S. 175, 79 L. T. N. S. 578, holding a surveyor's report made pursuant to public statutes, and required as a necessary condition precedent to sale of Crown lands by the commissioners was a public document and admissible in evidence as such; *The Ship Parkman v. United States*, 35 Ct. Cl. 406, holding that a statement filed before the Spanish Commission has no more force than a mere statement of claimant's case and gains no force by mere lapse of time as regards proving the matters set up therein; *Atty. Gen. v. Atty. Gen. Can.* Rep. (1906) App. Cas. 392, on admissibility of recitals in private acts.

The decision of the Vice Chancellor was distinguished in *R. v. Belleau*, 7 Can. S. C. 53, holding it being admitted on the record that all matters of fact appearing by the public accounts of Dominion of Canada shall be proved by reference to the official publications thereof production of documents is not required.

— Of births, marriages and deaths.

Cited in *Murray v. Supreme Lodge*, N. E. O. of P. 74 Conn. 715, 52 Atl. 722, holding a certified copy of the records of the registrar of births, marriages and deaths admissible to show age of one insured where fact of age was in dispute; *Johnston v. Hazen*, 3 N. B. Eq. 147, holding a marriage register while admissible as evidence of fact of marriage was not evidence of any other fact, as to contracting parties; *Re Trufort*, L. R. 36 Ch. Div. 600, 57 L. J. Ch. N. S. 135, 57 L. T. N. S. 674, 36 Week. Rep. 163, holding entries of birth and baptism in the civil and ecclesiastical registers kept at Naples were admissible in evidence in England as public documents; *Re Turner*, L. R. 29 Ch. Div. 985, 53 L. T. N. S. 528, on ground for admission of baptismal certificates to show age.

— Of statement of deceased person.

Cited in *Haines v. Guthrie*, L. R. 13 Q. B. Div. 818, 53 L. J. Q. B. N. S. 521, 51 L. T. N. S. 645, 33 Week. Rep. 99, 48 J. P. 756, holding an affidavit of a deceased father in an action to which plaintiff was not a party, in which age of son is stated, is not admissible as evidence of age of son who sets up infancy as defense to contract.

— Of collateral matters.

Cited in *Grant v. Dupont*, 8 B. C. 7, holding statement that the council compelled the architect to cut off part of sidewalk is not evidence that sidewalk curb was built contrary to the by-law; *Cushing v. Nantasket Beach R. Co.* 143 Mass.

77, 9 N. E. 22, holding the printed reports of engineers employed by the United States to ascertain steps necessary to protection of a harbor are not admissible in evidence to ascertain damages as between private parties.

The decision of the Vice Chancellor was cited in *Bradford v. Cunard S. S. Co.* 147 Mass. 55, 16 N. E. 719, holding the report of the appraiser who settled sum to be paid by insurers was not admissible to show the amount of damage suffered.

— Conclusiveness.

The decision of the Vice Chancellor was cited in *Atty.-Gen. v. Ludgate*, 8 B. C. 242, holding a statement in an incorporation act, private in its nature, is not conclusive on rights of the Crown; *Davis v. Moyles*, 76 Vt. 25, 56 Atl. 174, holding recitals in a private act are not evidence except against the persons who procured the enactment, or perhaps in certain cases, the state.

Preservation of public records.

Cited in *People v. Peck*, 67 Hun, 560, 22 N. Y. Supp. 576, 10 N. Y. Crim. Rep. 381 (dissenting opinion), on the duty of a public officer to preserve papers pertaining to office.

21 E. R. C. 696, *PRINTING & NUMERICAL REGISTERING CO. v. SAMPSON*,
44 L. J. Ch. N. S. 705, L. R. 19 Eq. 462, 32 L. T. N. S. 354, 23 Week. Rep. 462.

Judicial duty to maintain freedom of contract.

Cited in *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288, holding very high considerations of public policy are involved in the recognition of a wide liberty in making contracts; *United States Chemical Co. v. Provident Chemical Co.* 64 Fed. 946, holding the right to contract is a cardinal element in constitutional liberty and, as such, should be jealously guarded; *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 6 (dissenting opinion), on right of persons to contract without interference by courts; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 484, 13 N. E. 419, holding public policy and the interests of society favor the utmost freedom of contract, within the law; *Herriman v. Menzies*, 115 Cal. 16, 35 L.R.A. 318, 56 Am. St. Rep. 81, 46 Pac. 730, holding parties are to be given the widest latitude to make contracts with reference to their private interests; *James Quirk Mill. Co. v. Minneapolis & St. L. R. Co.* 98 Minn. 22, 116 Am. St. Rep. 336, 107 N. W. 742, holding it denies the right only when the particular contract violates some principle which is of even more importance to the general public.

— To enforce contracts.

Cited in *Reece v. Kyle*, 49 Ohio St. 475, 16 L.R.A. 723, 31 N. E. 747; *Hieronymus v. New York Nat. Bldg. & L. Asso.* 101 Fed. 12,—holding public policy requires that contracts of adults, entered into freely and voluntarily shall be enforced by the courts; *Brooks v. Cooper*, 50 N. J. Eq. 761, 21 L. R. A. 617, 35 Am. St. Rep. 793, 26 Atl. 978, holding all contracts entered into fully and voluntarily must be held sacred and be enforced by the courts; *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385, holding the most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape their obligations unless it clearly appears they contravene public right or the public welfare; *Consumer's Gas Trust Co. v. Littler*, 162 Ind. 320, 70 N. E. 363, holding where no

fraud or over-reaching is claimed, it is the duty of the court to give the instrument the effect intended by the parties at time of contracting.

Judicial interference with contracts on ground of public policy.

Cited in *Sheppey v. Stevens*, 177 Fed. 484, holding that contract in restraint of marriage is void as against public policy; *Hulse v. Bonsack Mach. Co.* 13 C. C. A. 180, 25 U. S. App. 239, 65 Fed. 864, holding in absence of fraud, mistake, illegality or oppression, and where no relations of trust or confidence exist between the parties, courts cannot inquire into the adequacy of the consideration of a contract; *Spangenberg v. Spangenberg*, 19 Cal. App. 439, 126 Pac. 379, holding that contract between heirs apparent during lifetime of father to share equally in his estate is not contrary to public policy; *Whalen v. Brennan*, 34 Neb. 129, 51 N. W. 759, holding that agreement between parties for purpose of preventing competition in letting of public contracts is void; *Missouri, K. & T. R. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159, holding the power to make contracts is too valuable a right to be lightly swept away under the general declaration that such contracts are contrary to public policy; *Wright v. Ross*, 11 Ont. L. Rep. 113, holding there is no reason why parties should not be allowed effectually to bind themselves as to the place of trial; *Allen Mfg. Co. v. Murphy*, 22 Ont. L. Rep. 539, 20 Ann. Cas. 657, holding that agreement by servant not to engage in business similar to that of master's may be enforced.

Cited in 1 Page, *Contr.* 698, on validity of monopoly contracts concerning patents; 2 Beach, *Contr.* 1936, on validity of Bohemian oats speculation; 2 Beach, *Contr.* 1953, on what is meant by public policy; 2 Beach, *Contr.* 2035, as to when restraint of trade in contract is valid; Benjamin, *Sales*, 5th ed. 511, on contracts against public policy; Hollingsworth, *Contr.* 250, on validity of agreement against public policy because unduly limiting rights of individual action; 2 Beach, *Contr.* 1128, on refusal to specifically enforce contract against public policy.

Distinguished in *Bonisteel v. Saylor*, 17 Ont. App. Rep. 505, holding where whole scheme of a transaction was clearly contrary to general well being of the public the courts will not enforce the contract; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540,—holding where business is of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce contracts imposing such restraint.

— Burden of proof.

Cited in *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, 49 L. J. Ch. N. S. 338, 42 L. T. N. S. 679, 28 Week. Rep. 623, 44 J. P. 663, holding one seeking to put a restraint upon the freedom of contract must show it is plainly necessary for the purposes of freedom of trade; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 30 L.R.A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 201, holding the burden is upon the party who seeks to put a restraint upon the freedom of contract to make it plainly and obviously clear that the contract is against public policy.

— Circumstances warranting interference.

Cited in *McGuffin v. Coyle*, 16 Okla. 648, 6 L.R.A.(N.S.) 524, 86 Pac. 962 (dissenting opinion), on rule for determining when contract is against public policy; *Houlton v. Nichol*, 93 Wis. 393, 33 L.R.A. 166, 57 Am. St. Rep. 928, 67 N. W. 715, holding it should be shown beyond reasonable controversy, that the contract is void, as contrary to law or sound morals, else it should be sus-

tained: *Atlantic Coast Line R. Co. v. Beazley*, 54 Fla. 311, 45 So. 761; *Osgood v. Central Vermont R. Co.* 77 Vt. 334, 70 L.R.A. 930, 60 Atl. 137,—holding contract not against public policy unless injurious to interests of the public, or contravening some established interest of society; *Smith v. San Francisco & N. P. R. Co.* 115 Cal. 584, 35 L.R.A. 309, 56 Am. St. Rep. 119, 47 Pac. 582, holding a transaction is not invalid as against public policy, unless it contravenes some positive statute, or some well established rule of law; *Godfrey v. Roessle*, 5 App. D. C. 299, holding when the party contracting has received the consideration therefor, it must plainly appear the contract contravenes public policy before it will be declared void; *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L.R.A.(N.S.) 1199, 67 S. E. 770, holding voting trust formed for purpose of keeping shares of stock in national bank in certain hands is void as against public policy; *Badische Anilin und Soda Fabrik v. Schott*, 61 L. J. Ch. N. S. 698, [1892] 3 Ch. 447, 67 L. T. N. S. 281, holding if the restraint of trade is not greater than can possibly be required for the protection of the business of the covenantee, it is not unreasonable; *United States v. Trans-Missouri Freight Asso.* 24 L.R.A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 58, holding the contract is to be assumed to have been made in good faith for the purpose which appears on its face, and not colorably for any other; *Wilson v. Carnley* [1908] 1 K. B. 729, 1 B. R. C. 901, 77 L. J. K. B. N. S. 594, 98 L. T. N. S. 265, 24 Times L. R. 277, 52 Sol. Jo. 239, holding that promise of marriage made by man who, to knowledge of promisee, was married, is void as against public policy.

Cited in note in 6 Eng. Rul. Cas. 455, on invalidity of contracts in restraint of trade.

— Cases of noninterference.

Cited in *Walker v. Lawrence*, 101 C. C. A. 417, 177 Fed. 363, holding that agreement by seller, on sale of liquor business and good will that he would not engage in like business in that or any adjoining county for six years and that he would remove from territory for five years, was not against public policy; *McCandless v. Allegheny Bessemer Steel Co.* 31 W. N. C. 378, 23 Pittsb. L. J. N. S. 223; *Couch v. Hutchinson*, 2 Ala. App. 444, 57 So. 75,—holding that court should not declare contract void as against public policy except in case free from doubt; *Re Garcelon*, 104 Cal. 570, 32 L.R.A. 595, 43 Am. St. Rep. 134, 38 Pac. 414, holding a contract not to contest a will is not against public policy and will be enforced; *Baltimore v. Garrett*, 108 Md. 24, 68 Atl. 429, holding a contract not contrary to public policy by reason of its continuing a conditional covenant, lawful in itself; *Consolidated R. Electric Lighting & Equipment Co. v. United States Lighting & Heating Co.* 77 N. J. Eq. 285, 78 Atl. 684; *A. B. Dick Co. v. Fuller*, 198 Fed. 404,—holding that contract by assignor of patent covering stencil paper, to disclose all future inventions relating to stencil paper and processes, is valid; *Re Grice*, 79 Fed. 627, holding it is only such combinations in restraint of trade that are unreasonable and oppressive that are against public policy; *Westinghouse Air Brake Co. v. Chicago Brake & Mfg. Co.* 85 Fed. 786, holding an assignment of a patent right and all future improvements thereon is not against public policy; *Bonsack Mach. Co. v. Smith*, 70 Fed. 383, holding the owner of a patented article by reason of an absolute and exclusive right in it may sell to another the right itself and agree that none other shall be permitted to use it; *Conklin v. Conklin*, 165 Mich. 571, 131 N. W. 154, holding that legatees under will may make valid agreements to forbear contest, and such contracts are favored when made

in good faith; *Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co.* 177 Mo. 559, 76 S. W. 1008, holding a contract to use and sell a certain patent during life of letters patent, and none other, is not against public policy as in restraint of trade; *Crowder-Jones v. Sullivan*, 9 Ont. L. Rep. 27, 4 Ann. Cas. 729, holding a contract with a woman about to be married to give her a stipulated sum to continue in service, when acted upon is enforceable; *Gunby v. Armstrong*, 66 C. C. A. 627, 133 Fed. 417, upholding a borrowing contract of a stockholder, entered into freely and with full knowledge of contents, though usurious by reason of pledge of stock where contract on face appeared lawful; *Diamond Match Co. v. Roeber*, 35 Hun, 421, upholding an agreement not to engage in manufacture or sale of friction matches in any of the several states of Union, where such agreement formed part of contract of sale; *Cook v. Shaw*, 25 Ont. Rep. 124, holding an agreement, as part of contract of sale, not to engage in like business in the Dominion of Canada for a period of ten years is enforceable; *Maxim Nordenfelt Gun Co. v. Nordenfelt* [1893] 1 Ch. 630, 62 L. J. Ch. N. S. 273, 68 L. T. N. S. 833, 41 Week. Rep. 604, holding same as to an agreement not to engage in manufacture of guns or ammunition for a period of twenty-five years; *Obanhein v. Arbuckle*, 80 App. Div. 465, 81 N. Y. Supp. 133, holding public policy does not prohibit a contract of indemnity between employer and employee, induced by a continuance of work with a defective tool on promise of indemnity in case of injury; *Peterson v. Seattle Traction Co.* 23 Wash. 615, 53 L.R.A. 586, 63 Pac. 539, holding the contract between employee and carrier exempting the carrier from liability for injuries to employee while riding on free pass will be upheld; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33, upholding a contract exempting a railroad company from liability for loss by fire to a lessee putting up buildings on a narrow strip of land adjoining the railroad right of way; *Heller v. National Marine Bank*, 89 Md. 602, 45 L.R.A. 438, 73 Am. St. Rep. 212, 43 Atl. 800, holding no principle of public policy is violated by giving preferred stockholders of a corporation priority of payment over creditors; *Tullis v. Jaeson* [1892] 3 Ch. 441, 61 L. J. Ch. N. S. 655, 67 L. T. N. S. 340, 41 Week. Rep. 11, holding a contract between parties to a building contract that the award of architect shall not be set aside on ground of fraud on part of others than contracting parties is not void as against public policy; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, 4 N. Y. Supp. 861, holding same as to an agreement not to engage in manufacture of thermometers within the United States for a specified number of years; *Caesar v. Capell*, 83 Fed. 403, holding there is no public policy against a transaction made by a citizen of the state who goes to another state and contracts, by reason of prohibitory statutes of this state; *Shragge v. Weidman*, 20 Manitoba L. Rep. 178, holding that agreement between two junk dealers, whereby they fixed prices, and agreed to divide profits and losses, was not void as against public policy; *Kay v. Moncton*, 36 N. B. 377, holding that agreement by city commissioner to accept reduction of salary, which arrangement had been assented to by both parties for five years, cannot be repudiated on ground of public policy; *Ryan v. McNichol*, 1 N. B. Eq. 487, holding that contract made by physician upon sale of good will was not contrary to public policy.

Cited in note in 2 L.R.A.(N.S.) 1095, on validity of contract to assign future inventions upon sale of patent.

21 E. R. C. 703, *BASSETT v. NOSWORTHY*, Cas. t. Finch 102, 2 White & T. Lead. Cas. in Eq. 4th ed. 1.

Who is innocent purchaser.

Cited in *Click v. Click*, 1 Heisk. 607, holding that purchaser at execution sale cannot avail himself of plea of innocent purchaser; *Woods v. Garnett*, 72 Miss. 78, 16 So. 390, holding that one who takes trust deed on land after having read on record prior trust deed, though not properly acknowledged, is not innocent purchaser.

What constitutes purchase in good faith.

Cited in *Bank of Farmington v. Ellis*, 30 Minn. 270, 15 N. W. 243, holding that good faith of second mortgagee may be inferred from payment of valuable consideration, where transaction occurs in ordinary course of business; *Mellick v. Mellick*, 47 N. J. Eq. 86, 19 Atl. 870, holding that prior indebtedness will not sustain plea of bona fide purchaser.

Purchaser for valuable consideration.

Cited in *Fargason v. Edrington*, 49 Ark. 207, 4 S. W. 763, holding that purchasers for valuable consideration, is entitled to protection against equity or trust of which they had no notice; *Atkinson v. Greaves*, 70 Miss. 42, 11 So. 688, holding that abandonment by creditor of present right to sue and acceptance of mortgage to secure debt, payable in future, constitutes purchaser for value; *De Mey v. Defer*, 103 Mich. 239, 61 N. W. 524; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250,—holding that one who obtains mortgage to secure payment of pre-existing debt, in consideration of extension thereby made of time of payment, is purchaser for valuable consideration; *Busey v. Reese*, 38 Md. 264, holding that under article 24, section 16 of Code, if deed be taken in payment of pre-existing debt, it is for good and valuable consideration; *Brooke v. Eric R. Co.* 41 Phila. Leg. Int. 204, 16 W. N. C. 514, holding that taking lands or chattels for pre-existing debt does not render creditor purchaser for value.

What constitutes good consideration.

Cited in *Arnold v. Hagerman*, 45 N. J. Eq. 186, 14 Am. St. Rep. 712, 17 Atl. 93, holding that covenant from which covenantor may be relieved, on account of failure of transfer for which it was made, is not good consideration within statute of frauds.

—Effect of notice of prior claim.

Cited in *Hall v. Livingston*, 3 Del. Ch. 348, holding that it is upon ground of mala fides, and not mere want of caution, that purchaser for valuable consideration is affected with notice of prior claim.

Bona fide purchaser for value, without notice.

Cited in *Watts v. Burnett*, 56 Ala. 340, holding that when mortgage is given to secure loan contemporaneously made, or made on faith of agreement that it should be given mortgagee is bona fide purchaser, and entitled to protection against equities; *Bragg v. Paulk*, 42 Me. 502, holding that persons receiving property of a debtor in trust for creditors or as indemnity against pre-existing liabilities, are only purchasers for a valuable consideration of such interest as their grantor has; *Learned v. Corley*, 43 Miss. 687, holding that no one is bona fide purchaser of land unless he made diligent and faithful inquiry as to title; *Sipley v. Wass*, 49 N. J. Eq. 463, 24 Atl. 233, holding that under statute absolute payment of debt is sufficient to make creditor bona fide purchaser for value; *Verner v. Betz*, 46 N. J. Eq. 256, 7 L.R.A. 630, 19 Am. St. Rep. 387, 19 Atl. 206, holding that a vendee who had loaned the vendor money and took a building

afterward in payment thereof was a bona fide purchaser for value; *Todd v. Outlaw*, 79 N. C. 235, holding that mortgagee is purchaser for value, and is not affected by equity outstanding where he had no notice; *Parker v. Randolph*, 5 S. D. 549, 29 L.R.A. 33, 59 N. W. 722 (dissenting opinion), on protection of purchaser as bona fide purchaser where there is quit claim deed in chain of title; *Rhea v. Allison*, 3 Head, 176; *Cook v. Cook*, 3 Head, 719,—holding that conveyance of land in payment of pre-existing debt does not put grantee in position of bona fide purchaser; *Rawles v. Perkey*, 50 Tex. 311, holding that purchaser without notice of prior vendor's lien, taking deed and paying part of purchase money, is bona fide purchaser to extent of purchase money paid without notice; *Yancy v. Batte*, 48 Tex. 46 (dissenting opinion), on innocent purchasers as favorites of courts of equity; *Cammack v. Soran*, 30 Gratt. 292, holding that purchaser of land in consideration of discharge of pre-existing debt, is innocent purchaser for valuable consideration.

—As affected by time or lack of payment.

Cited in *Pearce v. Foreman*, 29 Ark. 563, holding that where defense of innocent purchaser for value is set up affirmatively, and not in response to averment of bill, defendant must show complete purchase for value; *Servis v. Beatty*, 32 Miss. 52; *Re Campbell*, 3 Hughes, 276, Fed. Cas. No. 2,348; *Marchbanks v. Banks*, 44 Ark. 48,—holding that purchaser, though without notice of outstanding equity is not innocent purchaser unless he has paid whole consideration; *Whelan v. McCreary*, 64 Ala. 319; *Parker v. Foy*, 43 Miss. 260, 5 Am. Rep. 484; *Morris & E. R. Co. v. Sussex R. Co.* 22 N. J. Eq. 542; *Kitteridge v. Chapman*, 36 Iowa, 348; *Sillyman v. King*, 36 Iowa, 207,—holding that to entitle subsequent purchaser, without notice to protection against prior title, he must have actually paid consideration before notice; *Moresi v. Swift*, 15 Nev. 215; *Paul v. Fulton*, 25 Mo. 156,—holding that to constitute person bona fide purchaser for value without notice, purchase money should be paid before notice is received.

—Inadequacy of consideration as an objection.

Cited in *State Street Trust Co. v. Treasurer & Receiver General*, 209 Mass. 373, 95 N. E. 851, holding that to sustain right to specific performance of contract or rights of innocent purchaser for value and without notice, it is not necessary that consideration should be adequate; *Boydson v. Goodrich*, 49 Mich. 65, 12 N. W. 913, holding that where valuable consideration is paid for goods, fact that it is much below their value is not conclusive against purchaser's good faith; *Hartley v. M'Anulty*, 4 Yeates, 95, 2 Am. Dec. 396, holding that the question is whether the consideration is valuable and not as to the amount; *Richardson v. Chappell*, 6 S. C. 146, holding that in considering equity of purchaser from devisee for valuable consideration and without notice, court will not look into adequacy of consideration; *Snelgrove v. Snelgrove*, 4 Desauss Eq. 274, holding that it is no objection to a bona fide purchase without notice that the consideration was inadequate; *Bellas v. M'Carty*, 10 Watts, 13 (dissenting opinion), on the inadequacy of price as an objection to a purchase without notice.

—Protection afforded in equity.

Cited in *United States v. Clark*, 70 C. C. A. 584, 138 Fed. 294, holding that after entry is confirmed and title vested by issuance of patent, government cannot repudiate same and recover land for fraud of entryman, as against innocent purchaser; *Wood v. Mann*, 1 Sumn. 506, Fed. Cas. No. 17,951, on the bona fide purchase for value without notice as a bar in equity to a legal title;

Hardy v. Harbin, 1 Sawy. 194, Fed. Cas. No. 6,059, holding that a bona fide purchaser would be protected as against equitable rights set up by others; Bean v. Smith, 2 Mason, 252, Fed. Cas. No. 1,174, holding that a bona fide purchaser without notice from a grantee, to whom property has been conveyed in defraud of creditors, is entitled to hold the same against the creditors of the grantor; Thames v. Rembert, 63 Ala. 561, holding that when deed is not fraudulent on face, purchaser from fraudulent vendee may set up defense of bona fide purchase for valuable consideration without notice; Atlantic City v. New Auditorium Pier Co. 67 N. J. Eq. 610, 59 Atl. 158, holding that purchaser of land without notice of restrictive covenant in unrecorded deed is not bound by such covenant; Phelps v. Morrison, 24 N. J. Eq. 195, holding that purchaser under void deed, for valuable and adequate consideration, without notice, will be protected against antecedent creditor to amount he paid for property; Phelps v. Morrison, 25 N. J. Eq. 538, holding that under statute of frauds, bona fide purchaser acquiring title to lands from grantee to whom title has been fraudulently conveyed will be protected against judgment subsequently obtained against fraudulent grantor; Dixon v. Caldwell, 15 Ohio St. 412, 86 Am. Dec. 487, holding that bona fide purchaser of land warrant for value is not in equity trustee of legal title for true owner of warrant, although it was obtained by fraud of third person and transferred under forged indorsement; Sternberger v. Ragland, 57 Ohio St. 148, 48 N. E. 811, holding that bona fide purchaser at sale under judgment against record owner of title, without notice of unrecorded deed made before judgment acquires title against grantee in deed; Johnson v. Newman, 43 Tex. 628, holding that doctrine of innocent purchaser applies to holder of equitable title purchased without notice in case of conflicting equities; Carter v. Allan, 21 Gratt. 241; Mustard v. Wohlford, 15 Gratt. 329, 76 Am. Dec. 209; Hill v. Moore, 62 Tex. 610,—holding that bona fide purchaser of legal title without notice of rights to others, is entitled to protection against those who may have equitable interest in property purchased; Zollman v. Moore, 21 Gratt. 313, holding that if purchase is originally of equitable title without notice, and party afterwards purchases with notice, legal title to support equitable right, he will be protected; Hoult v. Donahue, 21 W. Va. 294, holding that purchaser of land for valuable consideration, without notice of prior equitable right, obtaining legal title at time of purchase is in equity as well as at law entitled to priority; Hall v. Delaplaine, 5 Wis. 206, 68 Am. Dec. 57; Hamilton v. McClelland, 45 Mo. 424; Bailey v. Timberlake, 74 Ala. 221,—holding that bona fide purchaser for valuable consideration is entitled to protection against all latent equities of which he had no notice; Stewart v. Boak, Russell (U. S.) 467, holding that a court of equity will not interfere against a bona fide purchaser for value without notice of the fraud in making the instrument; Manners v. Mew, 8 E. R. C. 682, L. R. 29 Ch. Div. 725, 54 L. J. Ch. N. S. 909, 53 L. T. N. S. 84, on purchase for valuable consideration and without notice as a defense.

Distinguished in Phillips v. Phillips, 10 E. R. C. 533, 31 L. J. Ch. N. S. 321, 4 De G. F. & J. 208, holding that there is no general rule that a court of equity will never assist a plaintiff against a defendant who is a bona fide purchaser for value.

—Necessity of pleading.

Cited in Nelson v. Owen, 113 Ala. 372, 21 So. 75, holding that defense that one is bona fide holder of pledge must be raised by plea or answer; Richards v. Snyder, 11 Or. 501, 6 Pac. 186, holding that to constitute purchaser in good

faith, as against outstanding equity, party must plead and prove that consideration was bona fide and truly paid, independent of recital in deed; *Rorer Iron Co. v. Trout*, 83 Va. 397, 5 Am. St. Rep. 285, 2 S. E. 713; *Lupo v. True*, 16 S. C. 579,—holding that purchase for valuable consideration without notice is equitable defense and must be set out in answer and maintained by defendant.

— Sufficiency of pleading.

Cited in *Stanton v. Green*, 34 Miss. 576, holding that to entitle party to protection as purchaser without notice, he must deny notice fully and particularly, whether defense be set up by plea or answer.

Affirmative equitable relief.

Cited in *Beatty v. Sweeney*, 26 Mich. 217, holding that where one who is applied to as owner of lands by one who wishes to purchase, disclaims title and represents another as owner, equity will compel release for benefit of party misled; *Quirk v. Thomas*, 6 Mich. 76, on purchase for a valuable consideration and without notice as grounds for affirmative relief in equity; *Wickes v. Lake*, 25 Wis. 71 (dissenting opinion), on right of one purchasing title for valuable consideration and without notice to assistance in equity.

What constitutes notice to purchaser.

Cited in *Baker v. Woodward*, 12 Or. 3, 6 Pac. 173, holding that fact that vendor holds only under deed of quit claim and release is sufficient notice to vendee to put him upon inquiry as to true state of title; *Staunton Nat. Valley Bank v. Harman*, 75 Va. 604, holding that a purchaser will not be charged with notice by being put on inquiry unless he has some more authentic means of information than can be found in an application to one who is interested in concealing the truth.

When purchaser is affected with notice of equitable rights.

Cited in *Bratton v. Rogers*, 62 Miss. 281, holding that if purchaser of land from holder of legal title thereto, have knowledge of actual occupancy thereof by tenant of another, he is affected with notice of such landlord's equitable rights.

Effect of notice of existing equity before completion of transaction.

Cited in *Peterkin v. MacFarlane*, 4 Ont. App. Rep. 25 (dissenting opinion), on effect of notice of existing equity before completion of transaction.

Protection given to purchaser with notice from bona fide purchaser without notice.

Cited in *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351, holding that one who with actual notice of insolvency of estate, purchases land from one who, without notice, bought from devisee after two years from grant of letters, will be protected by his grantor's want of notice; *Delespine v. Campbell*, 52 Tex. 4, to the point that purchaser with notice from bona fide purchaser without notice will be protected against equities; *Williams v. Lord*, 75 Va. 390; *Henninger v. Heald*, 52 N. J. Eq. 431, 29 Atl. 190,—holding that grantee from bona fide purchaser stands in same position as grantor, although affected with notice at time of grant.

Right to file cross-bill after publication passed.

Cited in *Field v. Schieffelin*, 7 Johns. Ch. 250, 11 Am. Dec. 441, holding that a cross-bill cannot be filed after publication passed in the original suit, and, if filed after publication, testimony taken in the cross-cause cannot be used.

Remedying defect in mortgage.

Cited in *Ross v. Worthington*, 11 Minn. 438, Gil. 323, 88 Am. Dec. 95, hold-

ing that where mortgage is attested by one witness only, it is in power of court to remedy defect, as against any one acquiring title with notice.

Bona fide incumbrances.

Cited in *Empire State Trust Co. v. William F. Fisher & Co.* 67 N. J. Eq. 602, 60 Atl. 940, 3 Ann. Cas. 393; *First Nat. Bank v. Farmers' & M. Nat. Bank*, 171 Ind. 323, 86 N. E. 417,—holding that mere execution of mortgage to secure overdue paper does not constitute mortgagee bona fide incumbrancer.

Right of assignee of equity to buy in legal title.

Cited in *Cherry v. Morton*, 8 Grant, Ch. 402, holding that assignee of bond for title without notice of equities who after notice obtains legal title does nothing inequitable.

Protection of party in possession as against another having equal equity.

Cited in *United States v. Detroit Timber & Lumber Co.* 67 C. C. A. 1, 131 Fed. 668; *Maybin v. Kirby*, 4 Rich. Eq. 105; *St. Johnsbury v. Morrill*, 55 Vt. 165,—holding that where two parties have equal equities in land, court will not turn party in possession out, and put another party in with no better right or equity.

Rental in deeds constituting chain of title as notice.

Cited in *Gaines v. Summers*, 50 Ark. 322, 7 S. W. 301, holding that purchaser of lands takes them with constructive notice of whatever appears in conveyances which constitute chain of title.

Right to production of deeds sustaining one's title to land.

Cited in note in 8 E. R. C. 726, on right to production of deeds sustaining one's title to land.

Burden of proof to show irregularities in title of purchaser of land for valuable consideration.

Cited in *Manchester v. Goeswich*, 95 Ark. 582, 130 S. W. 526, holding that where purchase of land is shown to have been for valuable consideration, burden of proving notice of irregularities therein devolves on those who attack.

Necessity of proof of notice of nonpayment of purchase price in action against assignee of purchaser.

Cited in *Stroud v. Pace*, 35 Ark. 100, holding that allegation in vendor's bill to enforce his lien for purchase money against assignee of his purchaser, that assignee had notice of nonpayment of purchase money, must be proved if denied.

Recital in deed of payment of purchase price as evidence.

Cited in *Bayliss v. Williams*, 6 Coldw. 440, holding that as against grantor, recital in deed of payment of purchase price is evidence of such payment; *Bugg v. Seay*, 107 Va. 648, 122 Am. St. Rep. 877, 60 S. E. 89, holding that recital in deed of payment of purchase price is evidence against grantor but as against grantee in prior deed is mere hearsay.

Possession of mortgage by mortgagor as raising presumption of payment.

Cited in *Harrison v. New Jersey R. & Transp. Co.* 19 N. J. Eq. 488, holding that simple fact that mortgage is in possession of mortgagor, does not per se raise presumption that debt secured by it has been paid.

Priority of liens or equities.

Cited in *Dickerson v. Carroll*, 76 Ala. 377, holding that purchasers at execution sale take, as against implied trusts, only such title as belonged to debtor,

with all encumbrances thereon; *Wilson v. Holt*, 83 Ala. 528, 3 Am. St. Rep. 768, 3 So. 321, on protection of bona fide purchaser for value of legal title to land acquired at judicial sale as against secret equities; *Preston v. McMillan*, 58 Ala. 84, holding that right to assert lien on land purchased with trust funds in favor of beneficiary, is recognized as against purchaser from trustee with notice actual or constructive; *Watkins v. Wassell*, 15 Ark. 73, holding that lien of judgment on land is not displaced in favor of subsequent liens or contracts by mere delay of judgment creditor to sue out execution; *Vannice v. Bergen*, 16 Iowa, 555, 85 Am. Dec. 531 (dissenting opinion), on purchaser at judicial sale as taking title subject to equities; *Evans v. McGlasson*, 18 Iowa, 150, holding that judgment creditor who purchases at execution sale, without notice of unrecorded deed, takes best title; *Parker v. Pierce*, 16 Iowa, 227, holding that lien of judgment creditor is not entitled to preference over prior equities of unrecorded conveyances; *Harrison v. Morton*, 83 Md. 456, 35 Atl. 99, holding that equitable title is only right to go into equity to have legal estate conveyed, and purchaser of equity takes same subject to every clog that may lie on it, whether he has notice or not; *Shotwell v. Harrison*, 22 Mich. 410 (dissenting opinion); *Summers v. Hutson*, 48 Ind. 228 (dissenting opinion),—on interference of court of equity between two persons having equal equities where one has obtained legal title; *Economy Sav. Bank v. Gordon*, 90 Md. 486, 48 L.R.A. 63, 45 Atl. 176, holding that where equities of parties are equal, legal title must prevail; *Fair v. Howard*, 6 Nev. 304, holding that mortgagee holding mortgage to secure antecedent debt had better title than person who held equitable interest in land under trust deed not recorded; *Conover v. Beckett*, 38 N. J. Eq. 384, holding that purchase at judicial sale, perfected by execution of deed discharges prior equities of which purchaser has no notice; *De Witt v. Van Sickle*, 29 N. J. Eq. 209, holding that assignee of mortgage takes it subject to all defenses existing against mortgagee in favor of mortgagor, but free from latent equities in favor of third persons; *Traphagen v. Hand*, 36 N. J. Eq. 384, holding that where defendant in judgment which had been paid off but not canceled of record, bona fide negotiated sale of it as valid judgment to bona fide purchaser to whom plaintiff assigned it, such judgment was valid as against subsequent judgment; *Sheetz v. Marks*, 2 Pearson (Pa.) 302, 13 Phila. 506, 35 Phila. Leg. Int. 340, holding that purchaser at sale by guardian's trustee in bankruptcy of land purchased in guardian's own name takes land subject to resulting trust; *Zorn v. Savannah & C. R. Co.* 5 S. C. 90, holding that unrecorded mortgage takes precedence over subsequent deed in payment of precedent debt; *Brown v. Bigley*, 3 Tenn. Ch. 618, holding that lawyer's lien on land for services declared by order of court is entitled to priority over lien of judgment creditor acquired by subsequent decree, where bill to enforce lawyer's lien is filed before sale under creditor's decree; *Wasserman v. Metzger*, 105 Va. 744, 7 L.R.A.(N.S.) 1019, 54 S. E. 893, holding that beneficiary of deed of trust to secure notes may procure setting aside of sale made in violation of trust as against purchaser at sale who was party to fraud; *Downer v. South Royalton Bank*, 39 Vt. 25, holding that assignee of chose in action takes it subject to equities residing in third persons against assignor; *John v. Larson*, 28 Wis. 604, holding that plaintiff took subject to defendant's rights where on foreclosure of mortgage on land of which defendant had possession, defendant forbid sale, claiming to own land; *Duggan v. London & C.*

Loan & Agency Co. 18 Ont. App. Rep. 305, holding that bank had right to hold stock pledged by broker for whole amount of loan although transfer contained words "in trust."

Necessity of purchaser investigating outstanding equities.

Cited in *Curtis v. Blair*, 26 Miss. 309, 59 Am. Dec. 257, holding that purchaser of land is only bound to investigate as to outstanding equities where circumstances are such as ought to put him on inquiry.

Concealment and acquiescence as bar to claim of title.

Cited in *Battery Park Bank v. Western Carolina Bank*, 138 N. C. 467, 50 S. E. 848, holding that where one knowingly suffers another in his presence to purchase property in which he has claim which he conceals, he will be deemed to have waived his claim.

Rights of one dealing with trustees with knowledge of fraudulent acts.

Cited in *Erie R. Co. v. Vanderbilt*, 5 Hun, 123, holding that where trustees use name of corporation in matters conducted for their private benefit with knowledge on part of him with whom they are dealing it is no defense in action brought by corporation for fraudulent disposition of property.

Protection accorded to holder for value of negotiable instrument.

Cited in *Harney v. First Nat. Bank*, 52 N. J. Eq. 697, 29 Atl. 221; *Gilman v. New Orleans & S. R. Co.* 72 Ala. 566,—holding that it is only holder for value, not mere volunteer, that law protects against equities and defenses to which negotiable instrument would be subject in hands of antecedent holders.

Who is holder for value of negotiable instrument.

Cited in *Blum v. Loggins*, 53 Tex. 121, holding that note taken in discharge of antecedent debt, is taken for valuable consideration and holder is bona fide holder; *Adams v. Soule*, 33 Vt. 538, holding that when bona fide purchaser of negotiable note gives his own note for price of purchase he is to be regarded as holder for value, in commercial sense.

Charging assignee of note with defenses available to maker.

Cited in *Carnahan v. Campbell*, 158 Ind. 226, 63 N. E. 384, holding that assignee of note which is not by law merchant is charged with such defenses as maker may have.

Protection accorded to bona fide purchaser of chattels.

Cited in *Wallace v. Cohen*, 111 N. C. 103, 15 S. E. 892; *Woolridge v. Thiele*, 55 Ark. 45, 17 S. W. 340,—holding that purchaser of goods in good faith, from one who obtained them by fraud, will be protected as bona fide purchaser where he has paid for them partly in cash and partly by releasing existing debt.

Notice to agent as notice to principal.

Cited in *Watson v. Sutro*, 86 Cal. 500, 24 Pac. 172, holding that notice to an agent is constructive notice to the principal.

Right of guarantor to know character and extent of guarantee.

Cited in *Walker v. Forbes*, 25 Ala. 139, 60 Am. Dec. 498, on the point that a guarantor has the right, when the contract of guaranty does not determine the character and extent of his responsibility, but there are left at the option of the creditor, to know in what manner that option has been exercised, so as to enable him to fulfil his engagement.

21 E. R. C. 706, *IND, C. & CO. v. EMMERSON*, L. R. 12 App. Cas. 300, 56 L. J. Ch. N. S. 989, 56 L. T. N. S. 778, 36 Week. Rep. 243, affirming the decision of the Court of Appeal, reported in L. R. 33 Ch. Div. 323.

Discovery of documents.

Cited in note in 8 E. R. C. 726, on right to production of deeds sustaining one's title to lands.

Distinguished in *Mexborough v. Whitwood* [1897] 2 Q. B. 111, 66 L. J. Q. B. N. S. 637, 76 L. T. N. S. 765, 45 Week. Rep. 564, holding that in an action to enforce a forfeiture of a lease for breach of covenant the court will not grant discovery of documents for the purpose of establishing the forfeiture.

— Sufficiency of affidavit.

Cited in *Budden v. Wilkinson* [1893] 2 Q. B. 432, 63 L. J. Q. B. N. S. 32, 4 Reports, 525, 69 L. T. N. S. 427, 41 Week. Rep. 657, holding that the omission of words to the effect that the documents did not tend to impeach the case of the party holding them, did not affect the sufficiency of the affidavit.

The decision of the Court of Appeal was cited in *Morris v. Edwards*, L. R. 15 App. Cas. 309, 60 L. J. Q. B. N. S. 292, 63 L. T. N. S. 26, holding that an affidavit of documents is sufficient even though it does not allege that the documents did not impeach the defense: *Atty-Gen. v. Newcastle-upon-Tyne* [1899] 2 Q. B. 478, 68 L. J. Q. B. N. S. 1012, 48 Week. Rep. 38, 81 L. T. N. S. 311, 15 Times L. R. 495, holding that an affidavit of documents was sufficient to support an objection to produce documents without the words that they did not impeach the case of the defendant.

Protection of purchaser for value without notice.

Cited in note in 21 E. R. C. 748, on protection of purchaser for value without notice.

21 E. R. C. 729, *PILCHER v. RAWLINS*, 41 L. J. Ch. N. S. 485, L. R. 7 Ch. 259, 25 L. T. N. S. 921, 20 Week. Rep. 281.

Priority of equities.

Cited in notes in 10 E. R. C. 567, on legal title prevailing where equities are equal; 18 E. R. C. 528, on priority of mortgagee acquiring legal estate; 18 E. R. C. 521, on priority between mortgages.

Right of mortgagee to obtain possession of title deeds.

Cited in note in 8 E. R. C. 707, on right of mortgagee to obtain possession of title deeds.

Purchaser for value without notice.

Cited in *Duggan v. London & C. Loan & Agency Co.* 18 Ont. App. Rep. 305, holding that one taking shares of stock not numbered or capable of identification, and without notice at the time of advancing the money is entitled to hold them as against true owner.

Cited in note in 21 E. R. C. 719, 723, 727, on rights of purchaser for value without notice.

Cited in *Underhill*, Am. Ed. Trusts, 492, 493, on following trust funds into hands of third parties.

Legal mortgagee as purchaser for value.

Cited in *Taylor v. London & County Bkg. Co.* [1901] 2 Ch. 231, 70 L. J. Ch. N. S. 477, 49 Week. Rep. 451, 84 L. T. N. S. 397, 17 Times L. R. 413, holding that a legal mortgagee who makes an advance without notice of prior equitable title is a purchaser for value without notice.

Notes on E. R. C.—132.

—**Equitable encumbrances with the legal title.**

Cited in *Mumford v. Stohwasser*, L. R. 18 Eq. 556, 43 L. J. Ch. N. S. 694, 30 L. T. N. S. 859, 22 Week. Rep. 833; *Bailey v. Barnes* [1894] 1 Ch. 25, 63 L. J. Ch. N. S. 73, 69 L. T. N. S. 542, 42 Week. Rep. 66, 18 E. R. C. 510,—on the title procured by an equitable owner or incumbrancer for value, without notice of prior equitable interests, who acquires the legal estate.

—**Notice.**

Cited in *Gray v. Fowler*, L. R. 8 Exch. 249, 42 L. J. Exch. N. S. 161, 29 L. T. N. S. 297, 21 Week. Rep. 916, on the effect of omission from the abstract of title, of deeds known to the parties, as affecting notice.

21 E. R. C. 752, *PATMAN v. HARLAND*, L. R. 17 Ch. Div. 353, 50 L. J. Ch. N. S. 642, 44 L. T. N. S. 728, 29 Week. Rep. 707.

—**Constructive notice of contents of title deeds.**

Cited in *Waggoner v. Dodson*, 96 Tex. 415, 73 S. W. 517, holding that purchasers of land are charged with notice of everything appearing on the face of their muniments of title; *Carroll v. Rogers*, 2 N. B. Eq. 159, holding that constructive notice of a deed is notice of what title such deed would disclose on its face; *Bentley v. Garnder*, 45 App. Div. 216, 60 N. Y. Supp. 1056, holding that a mortgage of parties who have acquired title to the mortgaged premises under a deed properly recorded, is chargeable with what that deed would have disclosed as a charge upon the land; *Sternbach v. Leopold*, 50 Ill. App. 476, holding that the principal being charged with constructive notice through his agent, is charged with all the knowledge the agent had.

Cited in note in 21 E. R. C. 743, on protection of purchaser for value without notice.

Cited in *Underhill*, Am. Ed. Trusts, 496, 497, on constructive notice to purchaser of trust property.

—**Where purchaser is told they have no reference to his land.**

Cited in *English & S. Mercantile Invest. Trust v. Brunton*, 62 L. J. Q. B. N. S. 136 [1892] 2 Q. B. 700, 4 Reports, 58, 67 L. T. N. S. 406, 41 Week. Rep. 133, holding that where the subsequent mortgagees were given to understand by the mortgagor that the outstanding incumbrances did not affect the security, the mortgagees were not charged with constructive notice of restrictive clauses in the outstanding debentures.

—**Lessee as charged with notice of lessor's title.**

Cited in *Gainsborough v. Watcombe Terra Cotta Co.* 54 L. J. Ch. N. S. 991, 53 L. T. N. S. 116; *Mogridge v. Clapp* [1892] 3 Ch. 382, 61 L. J. Ch. N. S. 534, 67 L. T. N. S. 100, 40 Week. Rep. 663,—holding that the lessee had notice of his lessor's title; *Littlejohn v. Soper*, 1 Ont. L. Rep. 172; *London, C. & D. R. Co. v. Bull*, 47 L. T. N. S. 413; *Tritton v. Bankart*, 56 L. T. N. S. 306, 35 Week. Rep. 474; *Spencer v. Bailey*, 69 L. T. N. S. 179; *Imray v. Oakshette* [1897] 2 Q. B. 218, 66 L. J. Q. B. N. S. 544, 76 L. T. N. S. 632, 45 Week. Rep. 681,—holding that a sublessee had constructive notice of the terms of the head lease; *Jones v. Lavington* [1903] 1 K. B. 253, 72 L. J. K. B. N. S. 98, 88 L. T. N. S. 223, 51 Week. Rep. 161, 19 Times L. R. 77, on same point.

—**Right to rely upon recitals in deed and verbal statements of grantor.**

Cited in *Bergstrom v. Johnson*, 111 Minn. 247, 126 N. W. 899, holding that one is not purchaser in good faith where he relied upon recital in deed and verbal statement of date of expiration of permit to remove wood from premises.

Purchase with notice of restrictive covenants.

Cited in *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388, holding that a restrictive covenant will be enforced in equity against subsequent purchasers with notice, if not against public policy, whether the covenant runs with the land or creates an easement; *Nottingham Patent Brick & Tile Co. v. Butler*, L. R. 15 Q. B. Div. 261, 54 L. J. Q. B. N. S. 545, 54 L. T. N. S. 444, 34 Week. Rep. 405, holding that a purchaser with notice of restrictive covenants is bound by them; *Re Nisbet* [1905] 1 Ch. 391, 74 L. J. Ch. N. S. 310, 53 Week. Rep. 297, 92 L. T. N. S. 448, 21 Times L. R. 261 [1906] 1 Ch. 386, 75 L. J. Ch. N. S. 238, 54 Week. Rep. 286, 94 L. T. N. S. 297, 22 Times L. R. 234, as to the vendee being charged with notice of restrictive covenants placed on the land by his vendor.

Cited in note in 15 E. R. C. 278, 279, on necessity of purchaser observing restrictive stipulations known to him.

Squatter obtaining title by possession as bound by restrictive covenants.

Cited in *Re Nisbet* [1906] 1 Ch. 386, 2 B. R. C. 844, 75 L. J. Ch. N. S. 238, 54 Week. Rep. 286, 94 L. T. N. S. 297, 22 Times L. R. 234, holding that restrictive covenant as to use of land binds squatter who obtained title by possession under statute.

Violation of restrictive covenant relative to building.

Cited in *Koch v. Gorruffo*, 77 N. J. Eq. 172, 140 Am. St. Rep. 552, 75 Atl. 767, holding that covenant to use premises only for private residence, is violated by constructing two family dwelling house, which is occupied by two families.

21 E. R. C. 774, *LE NEVE v. LE NEVE*, Ambl. 436, 3 Atk. 646, 1 Ves. Sr. 64, 2 White & T. Lead. Cas. 26.

Who is bona fide purchaser.

Cited in *Dodge v. Briggs*, 27 Fed. 160, holding that doctrine of bona fide purchaser without notice does not apply to conveyance made by quit claim deeds; *Lash v. Hardick*, 5 Dill. 505, Fed. Cas. No. 8,097, holding that judgment creditors, as affects unrecorded deeds, are in the same position as bona fide purchasers for value; *Jordan v. Pollock*, 14 Ga. 145, holding that purchaser will be considered one without notice unless knowledge is so brought home to him that mala fides would mark transaction, if he afterwards bought; *Parker v. Randolph*, 5 S. D. 549, 29 L.R.A. 33, 59 N. W. 722 (dissenting opinion), on purchaser under quit claim deed as bona fide purchaser.

Rights of a bona fide purchaser for value.

Cited in *Bailey v. Timberlake*, 74 Ala. 221, holding that a bona fide purchaser is entitled to protection against latent equities of which he has no notice; *Price v. McDonald*, 1 Md. 403, 54 Am. Dec. 657, holding that equitable claim founded upon deed not acknowledged, will be enforced in equity, except against bona fide purchaser, without notice; *Greenleaf v. Edes*, 2 Minn. 264, Gil. 226, holding that deed duly executed passes title without record as against all save bona fide purchasers or incumbrancers; *Ludlow v. Kidd*, 3 Ohio. 541, holding that a purchase of a leasehold estate in lands for valuable consideration may be protected in equity; *Edmondson v. Hays*, 1 Overt. 509, reported in full in *Cooke* (Tenn.) 163, 5 Am. Dec. 680, holding that a purchaser of a legal title for a valuable consideration without notice of an outstanding equity will not be affected by it, otherwise as to the purchaser of an equitable title; *Gibbes v. Greenville & C. R. Co.* 18 S. C. 299, holding that purchaser of bonds

constituting part of assets of railroad company in hands of receiver, without knowledge or notice of trust, is not liable to creditors of corporation for value of bonds; *Smith v. Winton*, 1 Overt. 230, 3 Am. Dec. 755, holding that one who has a legal title to land which he procured fairly and for a bona fide consideration cannot be touched or affected in law or equity; *Perkins v. Hays, Cooke* (Tenn.) 163, 5 Am. Dec. 680, holding that where a purchaser for valuable consideration without notice procures the legal title his rights take priority over those of the holder of an equitable interest only; *Fischer v. Lee*, 98 Va. 159, 35 S. E. 441, holding that proof of fraud of grantor is not sufficient of itself to avoid sale for value, but it must appear that grantee had notice of fraud or of facts and circumstances naturally calculated to excite suspicion.

Cited in note in 21 E. R. C. 744, 747, on protection of purchaser for value without notice.

Cited in 1 Beach, Trusts, 595, on trust arising from voluntary conveyance by trustee.

— Necessity of pleading.

Cited in *Cummings v. Coleman*, 7 Rich. Eq. 509, 62 Am. Dec. 402, holding that defense of bona fide purchase, without notice must be set forth in plea or answer with convenient certainty.

Rights of purchaser or mortgagee with notice.

Cited in *Simpson v. Montgomery*, 25 Ark. 365, 99 Am. Dec. 228, holding that the same equities which a vendor with notice of a mistake in the acknowledgment of a deed had, attached upon a reconveyance to him by a purchaser without notice; *Graves v. Contant*, 31 N. J. Eq. 763, holding that if person purchases land of vendee, with notice of vendor's equitable lien for purchase money, such purchaser will be charged with same trust as vendee; *Norwalk Nat. Bank v. Sawyer*, 38 Ohio St. 339, holding that person who takes mortgage on undivided interest of partner in land of firm, for individual debt, with notice, takes subject to rights of firm creditors.

Cited in 2 Devlin, Deeds, 3d ed. 1363, on purchaser having notice of trust holding property subject to the trust; 1 Beach, Trusts, 431, 433, on constructive trust from purchase with notice.

— Protection of purchaser with notice from purchaser without notice.

Cited in *Williams v. Lord*, 75 Va. 390, holding that purchaser with notice from purchaser without notice is protected in his title.

— Equitable estoppel affecting subsequent purchaser with notice.

Cited in *Oliver v. Sanborn*, 60 Mich. 346, 27 N. W. 527; *Anderson v. Blood*, 152 N. Y. 285, 57 Am. St. Rep. 515, 46 N. E. 493; *Kline v. Grannis*, 61 N. J. Eq. 397, 48 Atl. 566; *Anglesey v. Colgan*, 44 N. J. Eq. 203, 14 Atl. 627; *Raritan Water Power Co. v. Weglite*, 21 N. J. Eq. 463,—holding that equitable estoppel will affect subsequent purchaser to same extent as his grantor, when he has had notice or when circumstances were such as to put him on inquiry; *Gale v. Morris*, 30 N. J. Eq. 285, holding that where mortgage was intended as mortgage of fee but as executed, conveyed only estate for life, second mortgagee who believed it was mortgage of fee cannot claim as against it.

Binding effect upon purchaser of contents of instruments making up chain of title.

Cited in *Hayes v. Waverly & P. R. Co.* 51 N. J. Eq. 345, 27 Atl. 648, holding that where restrictive covenant is contained in deed which constitutes muniment of title, law conclusively charges each subsequent holder of title with notice of

it; *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679, 4 Mor. Min. Rep. 119; *Pane v. Abercrombie*, 10 Heisk. 161; *Gaston v. Dashiell*, 55 Tex. 508; *Burwell v. Fauber*, 21 Gratt. 446; *Witter v. Dudley*, 42 Ala. 616; *Shorter v. Frazer*, 64 Ala. 74; *Marks v. Cowles*, 61 Ala. 299,—holding that purchaser is bound by everything that appears on face of deeds making up chain of title.

Assignability of vendor's lien for purchase money.

Cited in *Nevitt v. McMurray*, 14 Ont. App. Rep. 126, holding that a vendor's lien for the purchase money is assignable, even by parol; *Armstrong v. Farr*, 11 Ont. App. Rep. 186, on vendor's lien for purchase money being assignable, even by parol.

Rights of assignee of chose in action.

Cited in *Duke v. Clark*, 58 Miss. 465, holding that assignee of chose in action takes subject to all equities to which it was subject in hands of assignor.

What constitutes notice of another's rights.

Cited in *Wilson v. Holt*, 83 Ala. 528, 3 Am. St. Rep. 768, 3 So. 321, holding that doctrine of caveat emptor, as applied to judicial sales, does no more than cover those defects discoverable by examination of chain of title; *Kitchen v. St. Louis, K. C. & N. R. Co.* 69 Mo. 224; *Spence v. Mobile & M. R. Co.* 79 Ala. 576,—holding that on purchase of commercial paper, information or notice of any fact calculated to excite suspicion, and which if followed up, would lead to discovery of latent equity is equivalent to actual notice; *Smith v. Gibson*, 15 Minn. 89, Gil. 66, holding that mere going upon land to fix fences is not sufficient to constitute notice to purchaser of property of such person's rights; *Wittkowsky v. Gidney*, 124 N. C. 437, 32 S. E. 731; *Foster v. Stallworth*, 62 Ala. 547,—holding that whatever is sufficient to put party on inquiry is good notice; *Kinsela v. Cataract City Bank*, 18 N. J. Eq. 158, to the point that whatever is sufficient to put person on inquiry is good notice; *Bohlman v. Coffin*, 4 Or. 313; *Carter v. Portland*, 4 Or. 339,—holding that whatever is sufficient to direct attention of purchaser to prior rights, so as to put him on inquiry, will operate as notice; *Black v. Childs*, 14 S. C. 312; *Clinton Loan Asso. v. Merritt*, 112 N. C. 243, 17 S. E. 296,—holding that where one has notice of opposing claim he is put on inquiry and is presumed to have notice of every fact which proper inquiry would have enabled him to discover; *McParland v. Peters*, 87 Neb. 829, 128 N. W. 523, holding that sufficiency of evidence to show that purchaser had notice of prior unrecorded deed depends upon circumstances of each case; *Martel v. Somers*, 26 Tex. 551, holding that if purchaser knew of existence of adverse title, it is not necessary to prove notice, and it is immaterial whether his knowledge came from parties in interest or from third persons; *Traylor v. Townsend*, 61 Tex. 144, holding that acknowledgment of fraud need not be proved if purchaser had means of knowing the fraud by use of reasonable diligence; *Chapman v. Chapman*, 91 Va. 397, 50 Am. St. Rep. 846, 21 S. E. 813, holding that notice to one of two trustees is notice to both; *Shelton v. Ficklin*, 32 Gratt. 727 (dissenting opinion), on means of knowledge of adverse claims as notice thereof; *Whiting v. Gould*, 2 Wis. 552, on sufficiency of notice of outstanding equity to affect purchaser's title to property; *Wickes v. Lake*, 25 Wis. 71 (dissenting opinion), on sufficiency of proof of knowledge of fraud on part of grantee of property, in order to set aside conveyance.

— Possession of land.

Cited in *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167, holding that possession

of vendee with unrecorded conveyance, will not give notice to subsequent purchaser whose conveyance is first recorded, unless such possession is open, notorious and exclusive; *Eylar v. Eylar*, 60 Tex. 315; *Bloomer v. Henderson*, 8 Mich. 395, 77 Am. Dec. 453,—holding that possession of land by grantor is no notice of any right in him, to one who acquires interest in land on faith of his recorded conveyance; *Groff v. State Bank*, 50 Minn. 234, 36 Am. St. Rep. 640, 52 N. W. 651, holding that possession by a grantor is notice to third persons of his rights; *Ferrin v. Errol*, 59 N. H. 234, holding that possession and occupation of land is constructive notice that such possession is under claim of title; *Losey v. Simpson*, 11 N. J. Eq. 246, holding that possession is notice only of legal or equitable interest which party in possession claims in land; *Johns v. Norris*, 27 N. J. Eq. 485, holding that actual possession by cestui que trust is constructive notice to purchaser, to put him upon inquiry; *Coleman v. Barklew*, 27 N. J. L. 357, holding that possession of land may be notice of right or claim of occupant as against purchaser; *Ranney v. Hardy*, 43 Ohio St. 157, 1 N. E. 523, holding that mortgagee and his assignee must take notice of interests of person in possession of land at time of execution of mortgage; *Smith v. Miller*, 63 Tex. 72, holding that tenant in possession under vendor cannot charge purchaser with notice of any right in him inconsistent with his tenancy; *Ellison v. Torpin*, 44 W. Va. 414, 30 S. E. 183, holding that actual possession of land is notice to purchasers of right of person in possession; *Moore v. Bank of British N. A.* 15 Grant, Ch. (U. C.) 308, holding that possession of property by party having unregistered deed is sufficient constructive notice as against subsequent conveyance.

— Constructive notice.

Cited in *Lehman v. Collins*, 69 Ala. 127, holding that registration of deed operates as notice only of rights derived from grantor, and not as notice of claims derived from others, not parties to deed; *Taylor v. Agricultural & M. Asso.* 68 Ala. 229, holding that notice of mortgage as recorded, although defective operates to prevent claim of bona fide purchaser without notice; *Masich v. Shearer*, 49 Ala. 226, holding that where purchaser is in possession of land under deed which has not been recorded, but which shows by recitals, that purchase money was not paid at time it was executed, subpurchaser from him is chargeable with notice of vendor's lien; *Stephens v. Anthony*, 37 Ark. 571, holding that when it appears upon face of deed that land was sold on time, and notes were given for purchase money, vendor's lien will pass to assignee of notes; and subsequent purchaser of land is chargeable with notice of lien; *Powers v. Perry*, 12 Cal. App. 77, 106 Pac. 595, holding that "constructive notice" is knowledge of such facts that party possessing such knowledge is conclusively presumed to know other things besides facts which are proved to have come to his knowledge; *Watson v. Sutro*, 86 Cal. 500, 24 Pac. 172, holding that purchaser must be held to have notice of everything which appears on face of deeds under which he buys; *Ulrich v. Drischell*, 88 Ind. 354, holding that purchaser who buys after rendition of final decree is chargeable with notice of its force and effect; *McNeil v. Jordan*, 28 Kan. 7; *Rowe v. Ream*, 105 Pa. 543, 14 W. N. C. 293, 14 Pittsb. L. J. N. S. 418, 41 Phila. Leg. Int. 136,—holding that actual visible possession of land, is constructive notice to purchasers of occupant's title, unless he has put on record title inconsistent with his possession; *Florance v. Morien*, 98 Va. 26, 34 S. E. 890; *Parker v. Banks*, 79 N. C. 480,—holding that registration of mortgage is notice to all purchasers from mortgagor subsequent to such registration; *George v. Wood*, 9 Allen, 80, 83

Am. Dec. 741, holding that record of conveyance of part of mortgaged premises is not notice to mortgagee of right to exemption from contribution to payment of mortgage, upon release by mortgagee of part of premises from mortgage; *Simmons v. Fuller*, 17 Minn. 485, Gil. 462, holding that record of mortgage which by mistake did not describe property intended was not notice to subsequent purchaser of property intended to be mortgaged; *Dutton v. McReynolds*, 31 Minn. 66, 16 N. W. 468, holding that record of conveyance is not notice of any other unrecorded title, which he may have subsequently acquired; *Gaston v. Merriam*, 33 Minn. 271, 22 N. W. 614, holding that deed, with recitals constitutes notice to purchaser; *Burke v. Beveridge*, 15 Minn. 205, Gil. 160, holding that record of deed and mortgage of land to which parties had no title is not notice to one who subsequently buys from grantor who had then obtained title; *Woods v. Garnett*, 72 Miss. 78, 16 So. 390, holding that one who buys an estate cannot invoke the protection of the registry act as against a deed recorded, but improperly acknowledged, at the time of his purchase; *Stewart v. Matheny*, 66 Miss. 21, 14 Am. St. Rep. 538, 5 So. 387, holding that purchaser of land is conclusively presumed to know what appears on face of title papers under which he claims; *Brooks v. Eskins*, 24 Mo. App. 296, holding that where copy of will devising lands was duly recorded, recording of will was constructive notice of it to subsequent purchaser; *Kellogg v. Randolph*, 71 N. J. Eq. 127, 63 Atl. 753, on the point that a purchaser is not bound by the record of a conveyance which fails to disclose or specify the property granted; *Longley v. Sperry*, 72 N. J. Eq. 537, 66 Atl. 1062, holding that record of chattel mortgage assignments, not properly acknowledged, and, therefore, not entitled to record, did not operate as constructive notice to subsequent mortgagee; *Bingham v. Kirkland*, 34 N. J. Eq. 229, holding that where one who has no title makes mortgage, which is recorded, and subsequently acquires title, subsequent purchaser is not chargeable, under registry acts, with constructive notice of mortgage; *McCrea v. Newman*, 46 N. J. Eq. 473, 19 Atl. 198, holding that recital in deed as to existing mortgages is sufficient to put purchaser on inquiry; *H. C. Tack Co. v. Ayers*, 56 N. J. Eq. 56, 38 Atl. 194, holding that chain of title to land showing title in father, and devise by him to three sons as tenants in common, and release deeds from two of sons to third person, conveying their title in a divided one-third of the land is not sufficient to charge purchaser with notice that land had been partitioned among sons by mortgage release deeds; *Spielmann v. Kliest*, 36 N. J. Eq. 199, holding that registration of instrument not required by law to be recorded, is no notice; *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687, holding that recording of second deed or mortgage will not operate as constructive notice to prior mortgagee; *Tarbell v. West*, 86 N. Y. 280, holding that registry of conveyance of equitable title, is not notice to purchaser of legal title from person who appears by record to be real owner; *Todd v. Outlaw*, 79 N. C. 235, holding that registration of mortgage executed without the state, execution of which was not proved according to law, does not pass title and is not constructive notice to subsequent purchaser; *Middletown v. Newport*, 16 R. I. 319, 1 L.R.A. 191, 15 Atl. 800, holding that purchaser is bound by conditions contained in instruments constituting lien of title; *Blanchard v. Morey*, 56 Vt. 170, holding that purchaser with notice of deed is bound by all its contents; *Hudson's Bay Co. v. Kearns*, 3 B. C. 330, holding that one taking title without inquiry as to title deeds, will be deemed to have had constructive notice of existence of equitable mortgage made upon deposit of title deeds; *Atkins v. Coy*, 5 B. C. 6, as to whether record of document of title

under sections 50 and 51 of Mineral act constitutes notice of it to subsequent purchaser.

— **Lis pendens.**

Cited in *Bolling v. Carter*, 9 Ala. 921, holding that pendency of suit by mortgagor of slave against mortgagee for foreclosure, is sufficient notice to one who takes mortgage pendente lite; *Whitfield v. Riddle*, 78 Ala. 99, holding that lis pendens is constructive notice, only while suit is pending, and not after its termination; *Bigelow v. Stringfellow*, 25 Fla. 366, 5 So. 816, holding that doctrine of lis pendens does not apply to person who purchased land from one who was afterwards made party to action pending when sale was made; *Tolerton v. Williard*, 30 Ohio St. 579, on lis pendens as notice; *Bybee v. Summers*, 4 Or. 354, holding that suspension of proceeding in partition for five years would be unreasonable delay and lis pendens would cease to bind subsequent purchaser; *Hook v. Hook*, 15 Phila. 631, 38 Phila. Leg. Int. 216, holding that a purchaser in good faith of land is not affected by the pendency of a suit that has not been diligently prosecuted; *Mann v. Roberts*, 11 Lea, 57, holding that laches that will defeat lis pendens as against innocent person must be determined by circumstances of particular case; *Roberts v. Francis*, 2 Heisk. 127; *Badger v. Daniel*, 77 N. C. 251; *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351,—holding that where designation of land in pleadings is so definite that any one by reading it can learn thereby what property is intended to be made subject of litigation, it is sufficient to constitute lis pendens; *Holbrook v. New Jersey Zinc Co.* 57 N. Y. 616, holding that pendency of action in another state to determine title to corporate stock is not constructive notice to purchaser in this state in title of his assignor; *Carr v. Fearington*, 63 N. C. 560, holding that assignee in bankruptcy takes subject to bill and lis pendens filed against bankrupt's land for fraud; *Morris v. Dovey*, 36 Phila. Leg. Int. 382, holding that pending litigation affects right of either party to alienate the property in controversy; *Thorpe v. Dunlap*, 4 Heisk. 674, holding that pendency of prior suit, duly prosecuted and not collusive, against same person to reach same property, is constructive notice to purchaser of property under later suit, and lis pendens runs from service of subpoena after filing bill; *Armstrong v. Broom*, 5 Utah, 176, 13 Pac. 364, on lis pendens as constructive notice; *Nelson & Ft. Sheppard R. Co. v. Jerry*, 5 B. C. 396; *Manson v. Howison*, 4 B. C. 404,—to the point that lis pendens affects person only who purchases from party during pendency of suit.

— **Excuse for making inquiry.**

Cited in *Rhodes v. Outcalt*, 48 Mo. 367; *Newman v. Samuels*, 17 Iowa, 528; *Wilson v. Williams*, 25 Tex. 54,—holding that where circumstances are such as to put interested upon inquiry, he may show existence of other attendant circumstances of nature to satisfy mind that further inquiry was unnecessary.

— **Effect of failure to make inquiry.**

Cited in *Hickman v. Green*, 123 Mo. 165, 29 L.R.A. 39, 22 S. W. 445 (dissenting opinion), on effect of failure of purchaser to make inquiry where he is in possession of facts demanding investigation.

— **Purchaser with notice as mala fide purchaser.**

Cited in *Brissell v. Knapp*, 155 Fed. 809, holding that act of person in securing legal title to stock, when he knew it belonged to another was fraudulent; *Wimbish v. Montgomery Mut. Bldg. & L. Asso.* 69 Ala. 575; *Holmes v. Stout*, 10 N. J. Eq. 419; *Corry v. Caxton*, 4 Binn. 140; *Morgan v. Elam*, 4 Yerg. 375;

Mitchell v. Peters, 18 Iowa, 119,—holding that purchaser who takes estate after notice of prior equitable right, makes himself mala fide purchaser; *Scott v. Reed*, 33 Minn. 341, 23 N. W. 463, holding that one who procures deed of land to defeat unrecorded deed is liable to grantee in unrecorded deed, if he sells land to innocent purchaser whose title is protected by record.

— **Purchase of land contract.**

Cited in *Wenz v. Pastene*, 209 Mass. 359, — L.R.A.(N.S.) —, 95 N. E. 793, holding that under statute one who enters into land contract for purchase of land but who before paying purchase price has notice of outstanding lease, takes subject thereto; *Converse v. Blumrich*, 14 Mich. 108, 90 Am. Dec. 230, holding that one buying rights of vendor in land contract with knowledge of equities of vendee buys subject to them.

Notice of prior unrecorded instrument as affecting operation of recording acts.

Referred to as a leading case in *Dixon v. Doe*, 1 Smedes & M. 70, holding that notice is equivalent to registration as against all persons: *Shotwell v. Harrison*, 22 Mich. 410 (dissenting opinion), on the effect of notice upon the validity of an unrecorded deed, and the right to attack its priority.

Cited in *French v. Gray*, 2 Conn. 92 (dissenting opinion), on effect of record of deed to subsequent grantee who has notice of existence of unrecorded deed to another; *Hume v. Riggs*, 12 App. D. C. 355, on the equitable doctrine of priority because of notice; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. ed. 1063, 12 Sup. Ct. Rep. 239, on the doctrine of implied and constructive notice; *Grindley v. Blakie*, 19 N. S. 27 (dissenting opinion), on notice of prior unrecorded instrument as preventing the operation of the recording acts; *Hardy v. Harbin*, 4 Sawy. 536, Fed. Cas. No. 6,060; *Scott v. Houpt*, 73 Ark. 78, 83 S. W. 1057 (dissenting opinion); *Porter v. Sevey*, 43 Me. 519; *Moore v. Collins*, 14 N. C. (3 Dev. L.) 126 (dissenting opinion); *Fleming v. Burgin*, 37 N. C. (2 Ired. Eq.) 584,—on notice of a prior unrecorded deed as affecting the operation of the recording acts; *Hull v. Diehl*, 21 Mont. 71, 52 Pac. 782; *Sheldon v. Powell*, 31 Mont. 249, 107 Am. St. Rep. 429, 78 Pac. 491,—on the priority of an unrecorded deed because of notice; *McMechan v. Griffing*, 3 Pick. 149, 15 Am. Dec. 198; *Musgrove v. Bonser*, 5 Or. 313, 20 Am. Rep. 737; *Claiborne v. Holmes*, 51 Miss. 146,—holding that if the holder of a recorded deed has notice of a prior unrecorded one he takes subject to the first; *Jackson ex dem. Gilbert v. Burgott*, 10 Johns. 457, 6 Am. Dec. 349, holding that a subsequent purchaser with notice of the prior unrecorded deed, will be postponed to that deed; *Westerly Sav. Bank v. Stillman Mfg. Co.* 16 R. I. 497, 17 Atl. 918, holding that a deed, unacknowledged and unrecorded, is valid as to other parties having actual notice of it, the same as if recorded; *Warnock v. Wightman*, 1 Brev. 331, holding that a purchaser having actual notice of a prior conveyance, is bound by it although his conveyance is first recorded; *Corry v. Caxton*, 4 Binn. 140, holding that a second recorded conveyance shall not prevail against prior unrecorded one, where there was actual notice to the holder of the second; *Ricks v. Doe*, 2 Blackf. 346, holding that a subsequent conveyance first recorded, will not prevail over a prior one, not recorded until after the time prescribed by law, where the subsequent purchaser has notice of the prior one; *Smith v. Cottrell*, 94 Ind. 379, holding that a party who buys with knowledge of a prior right is not a purchaser in good faith; *Byers v. Engles*, 16 Ark. 543; *Morton v. Robards*, 4 Dana, 258,—holding that an unrecorded deed is valid as against a judgment creditor with notice so as to

preserve the superiority of the deed; *Mead v. New York, H. & N. R. Co.* 45 Conn. 199, holding same as to an unrecorded mortgage; *Givens v. Branford*, 2 M'Cord, L. 152, 13 Am. Dec. 702, holding that an unrecorded marriage settlement will take priority over the claims of a creditor with notice of it; *Union Nat. Bank v. Oium*, 3 N. D. 193, 44 Am. St. Rep. 533, 54 N. W. 1034, holding that registration law affords no protection to purchaser who takes with notice of unrecorded instrument; *Westerly Sav. Bank v. Stillman Mfg. Co.* 16 R. I. 497, 17 Atl. 918, holding that deed acknowledged and unrecorded, but valid between parties to it, will be deemed valid as to parties having actual notice of it, under statute; *Chapman v. Edwards*, 16 B. C. 334, holding that fact that deed was registered first will not give it precedence where grantee had knowledge of prior unregistered deed; *Parks v. Ingraham*, 19 N. B. 195, holding that only effect of notice of previous unregistered instrument, is to entitle party claiming under it to relief in equity.

Cited in 3 Devlin, Deeds, 3d ed. 2646, on ineffectiveness of registration where purchaser knew of prior unregistered deed; 2 Devlin, Deeds, 3d ed. 1343, on rights of subsequent purchaser having notice of prior unrecorded deed; 2 Devlin, Deeds, 3d ed. 1136, on effect of notice of purchaser of prior unrecorded deed.

Distinguished in *Taylor v. Heriot*, 4 Desauss. Eq. 227, holding that a marriage settlement which the statute required to be registered within three months, was void as to creditors if not filed within the three months, although filed later and before the debts were contracted.

—As to mortgages.

Cited in *Neal v. Kerrs*, 4 Ga. 161, holding that a junior mortgagee with notice of a prior mortgage gains no priority by having his mortgage first recorded; *Johnston v. Canby*, 29 Md. 211, holding that a subsequent incumbrancer chargeable with actual notice of a pre-existing imperfect mortgage, will in equity be postponed to it; *Fowler v. Merrill*, 11 How. 375, 13 L. ed. 736, holding that a mortgage was valid as against a subsequent purchaser with notice; *Ohio L. Ins. & T. Co. v. Ross*, 2 Md. Ch. 25, holding that a purchaser with notice of a prior unrecorded mortgage cannot avail himself of his purchase as against the mortgage; *Burke v. Allen*, 3 Yeates, 351, holding that a prior unrecorded mortgage is valid as against subsequent purchasers or incumbrancers with actual notice of it; *Murphy v. Nathans*, 46 Pa. 508, 21 Phila. Leg. Int. 276, holding that where a mother purchased land for her daughter, which land was subject to a lien of an unrecorded mortgage of which the daughter knew, the mother was not a bona fide purchaser without notice; *Newman v. Chapman*, 2 Rand. Va. 93, 14 Am. Dec. 766, holding that a subsequent purchaser will be affected with notice of a prior unrecorded mortgage, if he has actual notice of the existence of such mortgage, actual or constructive; *Gooding v. Riley*, 50 N. H. 400, holding that a chattel mortgage, unrecorded, is valid as against a subsequent one having notice of the first; *King v. Kuhn*, 4 Manitoba L. Rep. 413, holding that a purchaser of oxen took them subject to an unfiled chattel mortgage where he had actual notice of it.

Distinguished in *Roff v. Kreeker*, 8 Manitoba L. Rep. 230, holding that a second chattel mortgage made in good faith and for a valuable consideration takes priority over a prior one unfiled, even though second mortgagee has actual notice of the first.

—As between judgment creditors and others.

Cited in *Pfeaff v. Jones*, 50 Md. 263, on the priority of an unrecorded mortgage over a subsequent judgment with notice; *Evans-Snyder-Buel*, 58 L.R.A.

900, 44 C. C. A. 494, 105 Fed. 293, holding that a judgment by default against a debtor in an attachment suit does not establish the lien against a mortgage validated by a subsequent recording statute; *McLaughlin v. Shepherd*, 32 Me. 143, 52 Am. Dec. 646, holding that an unrecorded bond will be operative as against an attaching creditor who had express or implied knowledge of it; *Dyer v. Thorstad*, 35 Minn. 534, 29 N. W. 345, on the effect of notice of an unrecorded conditional sale contract, upon the rights of attaching creditors; *Lamberton v. Merchant's Nat. Bank*, 24 Minn. 281; *Walker v. Gilbert, Freem. Ch. (Miss.)* 85,—holding that as against a subsequent judgment creditor with notice, an unrecorded deed is valid the same as though recorded; *Lamont v. Cheshire*, 65 N. Y. 30, on the effect on the rights of a plaintiff of knowledge of the other's rights through unrecorded deed, in filing notice of lis pendens; *Britton's Appeal*, 45 Pa. 172, 20 Phila. Leg. Int. 172, holding that an unrecorded purchase money mortgage was entitled to priority over a subsequent judgment where the judgment creditors had actual knowledge of the mortgage; *Bank of North America v. Fitzsimmons*, 3 Binn. 342, on the mala fides of the second judgment creditor as affecting the operation of the recording acts; *Bank of Montreal v. Baker*, 9 Grant, Ch. (U. C.) 298, holding that registered judgment creditor having notice of unregistered deed before judgment was registered is bound thereby.

Distinguished in *Schwinger v. Hickok*, 53 N. Y. 280, holding that a purchaser upon a sale under a void execution who has paid the purchase money in good faith without knowledge of the invalidity of the process, can maintain an action to recover it against the one who knew the sale to be invalid.

— Sufficiency of notice.

Cited in *Jordan v. Pollock*, 14 Ga. 145; *Vaughn v. Tracy*, 22 Mo. 415,—on the sufficiency of notice to give unrecorded deed priority over a recorded one; *Hall v. Livingston*, 3 Del. Ch. 348, holding that in order that a subsequent recorded deed be postponed to a prior unrecorded one, the purchaser must have such notice as to make it bad faith to take priority; *Doyle v. Teas*, 5 Ill. 202, holding that such notice to a subsequent purchaser, of a prior unrecorded deed, as will make him guilty of fraud in making the purchase, will postpone him to the prior unrecorded one; *Manners v. New*, 8 E. R. C. 682, L. R. 29 Ch. Div. 725, 54 L. J. Ch. N. S. 909, 53 L. T. N. S. 84, holding that where the mortgagee asked his solicitor for the title deeds and they were withheld on some reasonable excuse, he did not lose priority as against a subsequent equitable mortgage.

— As affected by lapse of time.

Cited in *Passumpsic Sav. Bank v. Buck*, 71 Vt. 190, 44 Atl. 93, holding that a mere lapse of time after the notice makes no difference in the effect of the notice as against a prior registered instrument.

Notice of prior unregistered equitable title.

Cited in *Hardy v. Harbin*, 1 Sawy. 194, Fed. Cas. No. 6,059, holding that a purchaser of real estate will be chargeable with all equities of which he has notice; *Almy v. Wilbur*, 2 Woodb. & M. 371, Fed. Cas. No. 256, holding that an equitable mortgage of personalty was valid as against parties having notice of it; *Graves v. Contant*, 31 N. J. Eq. 763, holding that if a person purchases land of a vendee with notice of the vendor's equitable lien for purchase money, the purchaser is subject to the same charge; *Jaques v. Weeks*, 7 Watts. 261, holding that if a purchaser have knowledge of a deed operating as a mortgage, unrecorded, he is in equity bound the same as the person of whom he purchased; *M'Clung v. Hughes*, 5 Rand. (Va.) 453, on the notice of the equities

of a prior locator as affecting the title of the second, who has secured the patent to the land: *Rose v. Peterkin*, 13 Can. S. C. 677, holding that the registry acts do not apply where the holder of the registered instrument has notice of the prior equitable lien: *Hudson's Bay Co. v. Kearns*, 3 B. C. 330, on the effect of mala fides in recording a prior deed; *Cogswell v. Graham, Russell* (N. S.) 33, holding that one who purchases an estate for a valuable consideration after notice of a prior equitable right makes himself a mala fide purchaser, and by getting the legal estate cannot defeat the equitable.

Notice to agent as notice to the principal.

• Referred to as a leading case in *Union Bank v. Call*, 5 Fla. 409, holding that notice to the agent is notice to the principal; *Meehan v. Williams*, 48 Pa. 238, 22 Phila. Leg. Int. 164, holding that the principal is not affected by notice to the agent unless it was acquired in the transaction of purchase.

Cited in *Connecticut General L. Ins. Co. v. Burnstine*, 131 U. S. CLIII, 24 L. ed. 706, holding that notice to an agent is notice to the principal; *May v. Le Claire*, 11 Wall. 217, 20 L. ed. 50, holding that knowledge of counsel in particular transaction is notice to his client; *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280, on notice to the agent as notice to the principal; *Smyth v. Oliver*, 31 Ala. 39, holding that actual notice to an agent is implied notice to the principal; *United States v. 278 Barrels of Distilled Spirits*, 3 Cliff. 261, Fed. Cas. No. 16,580; *Watson v. Wells*, 5 Conn. 468; *Bierce v. Red Bluff Hotel Co.* 31 Cal. 160,—holding that notice to agent is constructive notice to principal, where notice comes to agent while he is acting for principal and in course of every transaction; *Constant v. University of Rochester*, 111 N. Y. 604, 2 L.R.A. 734, 7 Am. St. Rep. 769, 19 N. E. 631; *Williams v. Birbeck, Hoffm. Ch.* 359,—on notice to the agent of unrecorded deed as notice to the principal; *Jackson ex dem. Bonnell v. Sharp*, 9 Johns. 163, 6 Am. Dec. 266, holding that notice to the agent of a prior unrecorded conveyance, was notice to the principal; *Myers v. Ross*, 3 Head, 59, holding that if the agent or trustee has notice of a prior incumbrance it is notice to the principal; *Kauffman v. Robey*, 60 Tex. 308, 48 Am. Rep. 264; *Trentor v. Pothén*, 46 Minn. 298, 24 Am. St. Rep. 225, 49 N. W. 129; *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352, 50 N. W. 240,—holding that principal is not legally chargeable with notice of facts learned by agent in course of employment in no way connected with his agency; *Wakeman v. Illingsworth*, 40 N. J. L. 431, holding that bank discounting note before maturity, is not chargeable with knowledge of illegality acquired by one of its directors, in other than his official capacity; *Bennett v. Buchan*, 76 N. Y. 386, holding that notice of an agent that, prior to an assignment of a judgment to his principal, the judgment had been released as to one of the debtors, is imputable to his principal; *Easley v. Barksdale*, 75 Va. 274, holding that notice to agent of fact which he does not communicate to his principal, is not actual notice but only constructive notice to principal; *Morrison v. Bausemer*, 32 Gratt. 225, holding that if agent, before commencement of agency, receive notice of unrecorded lien on land of which principal afterwards becomes purchaser, such notice will not be imputed to principal, unless there is strong evidence at time of purchase that agent remembered fact; *Martin v. South Salem Land Co.* 94 Va. 28, 26 S. E. 591, holding that where two companies having same person as director, enter into dealings with each other, knowledge of common director cannot be imputed to either company in transaction in which he did not represent it; *Cassiday Fork Boom & Lumber Co. v. Terry*, 69 W. Va. 572, 73 S. E. 278, holding that if agent with notice purchases property for his principal, latter holds

property in trust for person having prior equitable rights; *Terrell v. Branch Bank*, 12 Ala. 502, on notice to a director as notice to the bank; *Woodfolk v. Blount*, 3 Hayw. (Tenn.) 147, 9 Am. Dec. 736, holding that notice to the agent of want of free consent to a contract is notice to the principal; *Mundine v. Pitts*, 14 Ala. 84, holding notice to the agent or counsel employed by another person in another business at another time is not notice to the principal or client employing him afterwards; *Shannon v. Gore Dist. Mut. F. Ins. Co.* 37 U. C. B. 380, holding that if agent comes to knowledge of fact in course of the transaction, which afterwards becomes subject of litigation, notice to agent is notice to principal.

—Solicitor and client.

Cited in *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Haven v. Snow*, 14 Pick. 28,—on notice to an attorney as notice to the client; *Agra Bank v. Barry*, 21 E. R. C. 784, L. R. 7 H. L. 135, on notice to the solicitor as notice to the client; *Griffith v. Grillith*, Hoffm. Ch. 153, holding that notice to an attorney acting in the subject matter, is sufficient; *Commercial Bank v. Corke*, 9 Grant, Ch. (U. C.) 524, holding that notice to a solicitor in a transaction is notice to those for whom he is acting; *Pepper v. George*, 51 Ala. 190, holding notice to attorney is notice to the client if acquired during the existence of his employment; *Goff v. Lister*, 14 Grant, Ch. (U. C.) 451, holding that notice to a solicitor or agent, of an unregistered instrument has the same effect as express notice to the party himself; *Real Estate Invest. Co. v. Metropolitan Bldg. Soc.* 3 Ont. Rep. 476, holding that notice to the solicitor of alterations in instrument is notice to the client; *Leys v. McPherson*, 17 U. C. C. P. 266, on the application of the doctrine of constructive notice, where solicitor is one of the parties.

Distinguished in *MacArthur v. Hastings*, 15 Manitoba L. Rep. 500, holding that notice to the solicitor was not notice to the client, where solicitor naturally concealed his fraud.

—Trustee and cestui que trust.

Cited in *Fidelity Ins. T. & S. D. Co. v. Shenandoah Valley R. Co.* 32 W. Va. 244, 9 S. E. 180, holding that notice to trustee is notice to his cestui que trust.

Responsibility of principal for dealings of agent.

Cited in *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49, 9 N. E. 392; *Stranahan Bros. Catering Co. v. Coit*, 55 Ohio St. 398, 4 L.R.A.(N.S.) 506, 45 N. E. 634,—holding that he through whose agency the loss has occurred must sustain it; *Sherer v. McFarland*, 2 Yeates, 224, holding that he who trusts an agent must suffer by his neglect, and not a person who has placed no confidence in him; *Irvine v. Grady*, 85 Tex. 120, 19 S. W. 1028, holding that principal was not charged with notice of statements made by agent, where agent was authorized to purchase cattle, and negotiations for such purchase were broken off, but subsequently renewed by principal.

—Dealings ratified by acceptance of benefits.

Cited in *Kickland v. Menasha Wooden Ware Co.* 68 Wis. 34, 60 Am. Rep. 831, 31 N. W. 471, holding that where a party deals with an agent in good faith and unaware of any defect in his authority, and the principal accepts the fruits of the contract, he must also be bound by it.

Record as notice.

Cited in *McKenna v. Brooklyn Union Elev. R. Co.* 95 App. Div. 226, 88 N. Y. Supp. 762, holding the record of a deed was notice to a subsequent purchaser of a reservation in the deed; *Doswell v. Buchanan*, 3 Leigh, 365, 23 Am. Dec. 280,

on the recording of a mortgage of an equitable estate, as notice to a subsequent purchaser of the subsequently acquired legal estate.

Power of equity to go to the reality of the transaction.

Cited in *Frick v. Godare*, 144 Ind. 170, 42 N. E. 1015, holding that mistake in locating land in "northeast instead of in northwest quarter" of section, will not prevent title from passing where there is additional description by metes and bounds which furnishes means of identification: *Ross v. Worthington*, 11 Minn. 438, Gil. 323, 88 Am. Dec. 95, holding that when mortgage is attested by one witness only, it is in power of court of equity to remedy defect as against person acquiring title from mortgagor with notice; *Baart v. Martin*, 99 Minn. 197, 116 Am. St. Rep. 394, 108 N. W. 945, on the jurisdiction of a court of equity to set aside a certificate of title under the registration acts; *Wellner v. Eckstein*, 105 Minn. 444, 117 N. W. 830 (dissenting opinion), on the jurisdiction of the courts of equity to prevent fraud; *Sadler's Appeal*, 87 Pa. 154, on power of equity to follow trusts.

Rights of assignees of choses in action.

Cited in *Mathews v. Hamblin*, 28 Miss. 611, holding that the holder of money, the right to which had been assigned to a third person, who pays over the money before notice of another's claim by junior assignment is relieved from any liability.

Burden of proof to show lack of consideration in deed.

Cited in *Jones v. Berkshire*, 15 Iowa, 248, 83 Am. Dec. 412, holding that burden of proof is upon party making attack upon deed on ground of want of consideration.

Sufficiency of evidence of one witness as against answer.

Cited in *Farnam v. Brooks*, 9 Pick. 212; *White v. Walker*, 5 Fla. 478,—holding that party cannot be charged against his own denial, in his answer under oath on testimony of single witness.

Effect of answer on hearing upon bill and answer only.

Cited in *Wetmore v. White*, 2 Cai. Cas. 87, 2 Am. Dec. 323; *Wynn v. Rosette*, 66 Ala. 517,—holding that where cause is submitted for hearing on bill and answer only, answer on oath required and made, answer is to be taken as true, so far as is responsive to allegations of bill, but no further.

Decree in equity against the answer.

Cited in *Lingan v. Henderson*, 1 Bland, Ch. 236, on the answer of the wife as obligatory on her; *Swift v. Dean*, 6 Johns 523, on the right of a court of equity to make a decree against the answer, where the bill has only one witness and is expressly denied by the answer.

Construction of statutes.

Cited in *Clark v. Hoskins*, 6 Conn. 106, holding that statutes should be construed so as to best answer intention which makers had in view; *Reid v. Whitehead*, 10 Grant, Ch. (U. C.) 446, on the English registration act and its objects.

21 E. R. C. 784, *AGRA BANK v. BARRY*, L. R. 7 H. L. 135.

Constructive notice.

Cited in *Martin v. Poole*, 36 App. D. C. 281, holding that constructive notice, in its nature, is no more than evidence of notice, presumption of which is so violent that court will not permit it to be controverted.

Cited in note in 21 E. R. C. 761, 763, on purchaser being affected with con-

structive notice of all facts which would have been discovered by requiring usual title.

Actual notice of prior unrecorded interest as affecting operation of recording acts.

Cited in *Williams v. Jackson*, 107 U. S. 478, 27 L. ed. 529, 2 Sup. Ct. Rep. 814; *Re Roche, Jr.* L. R. 25 Eq. 284; *Havighorst v. Bowen*, 214 Ill. 90, 73 N. E. 402 (affirming 116 Ill. App. 230),—on the equitable doctrine of actual and constructive notice as affected by the recording acts; *Miller v. Duggan*, 23 N. S. 140; *Cooley v. Smith*, 40 U. C. Q. B. 543,—on the effect of actual notice of an unrecorded title upon the registered title; *Rose v. Peterkin*, 13 Can. S. C. 677 (affirming 9 Ont. App. Rep. 429), holding that the registry act did not apply as against a party, registering an instrument, having notice of a prior equitable lien, charge or interest; *Bridge v. Johnston*, 6 Ont. L. Rep. 370, holding that though one assignment of the Indian lands was first recorded, it did not take priority over a prior one subsequently recorded, where the former had actual notice of the prior assignment.

— Sufficiency of actual notice.

Cited in *Turpin v. Ogle*, 4 Ill. App. 611, holding that notice to protect the holder of an unrecorded interest in land must amount to registry, and is not sufficient if it barely puts the other on inquiry; *Ross v. Hunter*, 7 Can. S. C. 289, holding that to defeat a registered deed there must be actual notice, or fraud; *Re Hall, Jr.* L. R. 31 Eq. 416, holding that notice required to prevent a mortgagee from relying on the priority of his registration must be actual notice clearly brought home such as would make it a fraudulent act to seek to rely on the priority of registration.

— Failure to make inquiry as raising presumption of notice.

Cited in *Protection Bldg. & L. Asso. v. Knowles*, 54 N. J. Eq. 519, 34 Atl. 1083, on the necessity of subsequent purchaser or mortgagee protecting prior rights by inquiry; *New Brunswick R. Co. v. Kelly*, 26 Can. S. C. 341, holding that to postpone a deed which has acquired priority over an earlier conveyance, by registration, actual notice such as to make the conduct amount to fraud is indispensable; *Hudson's Bay Co. v. Kearns*, 4 B. C. 536, holding that failure to make inquiries in order to amount to actual notice must constitute actual fraud and this will not be inferred; *Stark v. Stephenson*, 7 Manitoba L. Rep. 381, holding that in order to have failure to make inquiries amount to actual notice there must be wilful abstinence and fraudulent determination not to be informed; *Northern Counties F. Ins. Co. v. Whipp*, L. R. 26 Ch. Div. 482, 53 L. J. Ch. N. S. 629, 51 L. T. N. S. 806, 32 Week. Rep. 626, 10 E. R. C. 516, holding that in order that a legal mortgage be postponed to subsequent mortgage, the carelessness and want of prudence in the custody of the title deeds, must amount to fraud; *Manners v. Mew*, 8 E. R. C. 682, L. R. 29 Ch. Div. 725, 54 L. J. Ch. N. S. 909, 53 L. T. N. S. 84, holding that in order that a prior recorded deed may be postponed to a latent title or security, the failure to secure the custody of the prior deeds must be such as to amount to fraud.

Distinguished in *Oliver v. Hinton* [1899] 2 Ch. 264, 68 L. J. Ch. N. S. 583, 48 Week. Rep. 3, 81 L. T. N. S. 212, 15 Times L. R. 450, holding that where the party failed to demand the title deeds, he was charged with notice of a prior mortgage by deposit of the title deeds.

Agent's knowledge of prior unrecorded deed.

Distinguished in *Stanley v. Schwalby*, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754, holding that in order that the principal may be charged with the knowl-

edge the agent or attorney has of a prior unrecorded deed, the attorney must have such knowledge as would lead him to the conveyance.

Negligence as evidence of fraud.

Cited in *Kelly v. Munster & L. Bank, Ir.* L. R. 29 Eq. 19, on negligence as evidence of fraud.

Purchaser's duty to take notice of recorded deeds.

Cited in *McKillop v. Alexander*, 45 Can. S. C. 551, 1 Dow. L. R. 586 (dissenting opinion), on duty of purchaser to investigate vendor's title.

Distinguished in *Kettlewell v. Watson*, L. R. 21 Ch. Div. 704, 51 L. J. Ch. N. S. 281, 46 L. T. N. S. 83, 30 Week. Rep. 402, L. R. 26 Ch. Div. 501, 53 L. J. Ch. N. S. 717, 51 L. T. N. S. 135, 32 Week. Rep. 865, holding that a purchaser of land in a register county is bound to inquire for and examine the deeds and documents, memorials of which are registered.

Rights of bona fide purchaser without notice.

Cited in *Havighorst v. Bowen*, 116 Ill. App. 230, holding that release of trust deed, executed before maturity of indebtedness, will not be set aside at instance of purchaser of indebtedness purporting to be secured thereby, as against bona fide holder of subsequent incumbrance, without notice of want of authority of trustees to release trust deed.

Effect of registration acts.

Cited in *Peterkin v. McFarlane*, 9 Ont. App. Rep. 429, holding that priority of registration of deeds of conveyance as provided by statute must not be lightly interfered with.

21 E. R. C. 820, *KENNEDY v. GREEN*, 3 Myl. & K. 699, 41 Revised Rep. 176.

Constructive notice.

Cited in *United States v. Detroit Timber & Lumber Co.* 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282; *Townsend v. Little*, 109 U. S. 504, 27 L. ed. 1012, 3 Sup. Ct. Rep. 357,—holding that constructive notice is in its nature no more than conclusive evidence of notice; *Wood v. Carpenter*, 101 U. S. 135, 25 L. ed. 807; *Angle v. North Western Mut. L. Ins. Co.* 92 U. S. 330, 23 L. ed. 556; *Powers v. Perry*, 12 Cal. App. 77, 106 Pac. 595,—holding that “constructive notice” is knowledge of such facts that party possessing such knowledge is conclusively presumed to know other things besides facts which have been proved to have come to his knowledge; *Jordan v. Pollock*, 14 Ga. 145, holding that constructive notice, is such, as by judgment of law, purchaser is presumed to have received; *Allen v. Puritan Trust Co.* 211 Mass. 409, L.R.A.1915C., 518, 97 N. E. 916, to the point that doctrine of constructive notice has no application, where there is no duty of inquiry resting upon party to be charged with notice; *Thomas v. Flint*, 123 Mich. 10, 47 L.R.A. 499, 81 N. W. 936, on the doctrine of constructive notice; *Bergeron v. Brunet*, Rap. Jud. Quebec, 27 C. S. 389, on doctrine of constructive notice; *Re London Election Case*, 24 U. C. C. P. 434, on what constitutes constructive notice.

Cited in note in 21 E. R. C. 807, on constructive notice of prior unrecorded deed.

Cited in 2 Devlin, *Deeds*, 3d ed. 1351, on what is constructive notice; *Smith*, Eq. Rem. 125, on what constitutes constructive notice.

—How proved.

Cited in *Cleveland, C. C. & St. L. R. Co. v. Moore*, 170 Ind. 328, 82 N. E. 52, holding that constructive knowledge of fact may be proved by circumstantial evidence.

Notice through failure to pursue inquiry.

Cited in *Shauer v. Alterton*, 151 U. S. 607, 38 L. ed. 286, 14 Sup. Ct. Rep. 442, holding that under statute prohibiting conveyances in fraud of creditors, grantee is deemed to have notice of fraud where he was in possession of facts calling for inquiry; *Yancy v. Cothran*, 32 Fed. 687, on the point that whatever is notice enough to excite attention and put a party upon his guard, and call for inquiry, is notice of everything to which such inquiry would lead; *Scammon v. Cole*, 3 Cliff. 472, Fed. Cas. No. 12,432, holding that mortgage given in consideration of pre-existing debt, is void where made within four months of filing petition in bankruptcy and where mortgagee had reasonable ground to believe mortgage was made in fraud of bankruptcy act; *Johnston v. Standard Min. Co.* 148 U. S. 360, 37 L. ed. 480, 13 Sup. Ct. Rep. 585, 17 Mor. Min. Rep. 554, holding that where question of laches is in issue plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided facts already known to him were such as to put him upon inquiry; *Rugan v. Sabin*, 3 C. C. A. 578, 10 U. S. App. 519, 53 Fed. 415; *Wier v. Johns*, 14 Colo. 493, 24 Pac. 262; *Lawrence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136,—holding that if person dealing with trust property omits to inquire, he is then chargeable with all knowledge of facts that by proper inquiry he might have learned; *Teall v. Slaven*, 40 Fed. 774, holding that clue to facts, which if diligently followed would lead to discovery of fraud, is in law equivalent to discovery; *Carr v. Hilton*, 1 Curt. C. C. 390, Fed. Cas. No. 2,437, holding that notice which makes it duty of party to make inquiry, and show where it may be effectually made, is notice of all facts to which such inquiry might have led; *Martin v. Smith*, 1 Dill. 85, Fed. Cas. No. 9,164, holding that when person has sufficient information to lead him to fact, he shall be deemed conversant with it; *Reed v. Munn*, 80 C. C. A. 215, 148 Fed. 737, on the doctrine of constructive notice; *Swift v. Smith*, 25 C. C. A. 154, 49 U. S. App. 181, 79 Fed. 709; *United States v. Union Bridge Co.* 143 Fed. 377; *International Mercantile Marine Co. v. Fels*, 164 Fed. 337; *Russell v. Ransom*, 76 Ill. 167; *Ellis v. Harrman*, 90 N. Y. 466; *United States v. Union Bridge Co.* 36 Pittsb. L. J. N. S. 197; *Jewell v. Truhn*, 38 Minn. 433, 38 N. W. 106,—holding that whatever is notice enough to excite attention and put party on his guard, and call for inquiry, is notice of everything to which inquiry might have led; *Kansas City Southern R. Co. v. Stevenson*, 135 Fed. 553; *Dauphin's Succession*, 112 La. 103, 36 So. 287; *Parker v. Foy*, 43 Miss. 260, 5 Am. Rep. 484; *Great Falls Bank v. Farmington*, 41 N. H. 32; *Hingtgen v. Thackery*, 23 S. D. 329, 121 N. W. 839; *Reynolds v. Commerce F. Ins. Co.* 47 N. Y. 597,—holding that where person has sufficient information to lead him to fact, he shall be deemed conversant with it; *Miller v. Aldrich*, 31 Mich. 408, holding that where an owner of land gave a mortgage to one who had acted as surety for him to secure the latter from law and also took out an insurance policy on the property, with a provision therein making it payable to the surety to the extent of the surety's claim, a purchaser taking title subject to the mortgage and with knowledge of the existence of the policy, is chargeable with notice of the contents thereof; *Williamson v. Brown*, 15 N. Y. 354, holding that where an examination, based upon information leading a person to believe that there was an unrecorded mortgage, would have disclosed such mortgage, such information amounts to implied notice of such instrument; *Beaver Valley Brewing Co. v. Wyss-Thalman*, 57 Pittsb. L. J. 413, holding that whatever is notice enough to excite attention and put a party upon his guard and call for inquiry is notice of everything to which such inquiry would have led to; *Hudson's Bay Co. v. Kearns*, 4 B. C. 536 (dissenting opinion); *Ross v. Hunter*, 7 Can. S. C. 289, —

on failure to make inquiry as charging party with constructive notice of what he would have learned; *Lee v. Clutton*, 45 L. J. Ch. N. S. 43, 33 L. T. N. S. 717, 24 Week. Rep. 106, on the intentional failure to inquire as charging party with constructive notice; *Greenslade v. Dare*, 24 L. J. Ch. N. S. 490, 20 Beav. 284, 1 Jur. N. S. 294, 3 Week. Rep. 220, on constructive notice by failure to make inquiry when placed on guard; *Wilson v. Wall*, 34 Ala. 288; *Bland v. Fleeman*, 58 Ark. 84, 23 S. W. 4,—holding that notice of such circumstances as would put an ordinarily prudent man on inquiry is equivalent to notice of all the facts a reasonable inquiry would disclose; *Woodruff v. Williams*, 35 Colo. 28, 5 L.R.A. (N.S.) 986, 85 Pac. 90, holding that whatever is notice enough to put interested party on inquiry is generally regarded as good notice of all matters which inquiry would have disclosed; *Ater v. Smith*, 245 Ill. 57, 91 N. E. 776, 19 Ann. Cas. 105, holding that if circumstances were such as should have induced inquiry, neglect to make such inquiry, will charge party with laches, same as if he had inquired and learned facts; *Howard Ins. Co. v. Halsey*, 4 Sandf. 565, holding that he who is bound to inquire before he performs an act by which he has reason to believe that the rights of others will be affected, is chargeable with a knowledge of all the facts that an inquiry properly made, would have disclosed to him; *Kansas Moline Plow Co. v. Sherman*, 3 Okla. 204, 32 L.R.A. 33, 41 Pac. 623, holding that conveyance to hinder and delay creditors is fraudulent as to grantee, when he had notice of such facts as would arouse his suspicion and cause him to make inquiry as to purpose of transfer, which would disclose grantor's fraudulent intent; *Rogers v. Van Nortwick*, 87 Wis. 414, 58 N. W. 757, holding that where question of laches is in issue, plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided facts known to him were sufficient to put person to inquiry; *Hardy v. Desjarlais*, 8 Manitoba L. Rep. 550, holding that where the party is put upon inquiry, he is charged with constructive notice of everything to which such inquiry would have led; *Gilleland v. Wadsworth*, 1 Ont. App. Rep. 82 (reversing 23 Grant, Ch. [U. C.] 547), holding that by failure to make inquiries the party was deemed to have constructive notice of what he would have learned from the record; *Arkell v. Wilson*, 5 Grant, Ch. (U. C.) 470, holding that where the party has had notice of circumstances sufficient to put them upon inquiry and they have failed to make such inquiry, he is chargeable with constructive notice; *Northwood v. Keating*, 18 Grant, Ch. (U. C.) 643, on notice imported by ill-drawn documents; *Berwick v. Price* [1905] 1 Ch. 632, 74 L. J. Ch. N. S. 249, 92 L. T. N. S. 110, holding that a purchaser who purchases land without demanding a delivery of the title deeds is chargeable with constructive notice of the sub-mortgage for which these deeds had been deposited.

Cited in 2 Devlin, Deeds, 3d ed. 1378, on conclusive presumption of notice where purchaser fails to make due inquiry.

Distinguished in *Jones v. Williams*, 24 Beav. 47, 3 Jur. N. S. 1066, 5 Week. Rep. 175, holding that when the circumstances of the case put a purchaser upon inquiry a false or a reasonable answer may dispense with further inquiry but probability that a false answer will be given does not do away with the necessity of making the inquiry; *Jones v. Smith*, 12 L. J. Ch. N. S. 381, 1 Phill. Ch. 245, 7 Jur. 431, holding that where the assignee of a mortgage term was told by the mortgagor that a marriage settlement had been made but assured him that it did not apply to the mortgaged lands, when in fact it did, he took without notice of the settlement; *Ex parte West*, 56 L. T. N. S. 622, holding that where a shareholder had sold part of his shares, he was entitled to rescind

the balance of the contract between him and the company because of fraud in the company's prospectus.

Possession of land as notice.

Cited in *Adams-Booth Co. v. Reid*, 112 Fed. 106, holding that fact that at time of execution of mortgage two sons, one of whom was 22 and other 20 years of age, resided with their father and mother on mortgaged property, does not constitute such possession by sons as to charge mortgagee with constructive notice of their rights under agreement with father; *Percy v. Cockrill*, 4 C. C. A. 73, 10 U. S. App. 574, 53 Fed. 872, holding that information as to terms of will, and finding of collusive purchaser in possession of land left in trust to brother of claimant under will for claimant's benefit, was sufficient to set statute of limitations running.

Sufficiency of facts to put person on inquiry.

Cited in *Frazer v. Western*, How. App. Cas. 448 (dissenting opinion), on notice that deed is voluntary as sufficient to put purchaser on inquiry; *Frazer v. Western*, 1 Barb. Ch. 220, on question whether purchaser, being chargeable with notice of deed being voluntary, is not chargeable with duty of inquiring whether it was made in state of insolvency, and into all facts connected with it; *Larkin v. United States*, 5 Ct. Cl. 526 (dissenting opinion), on sufficiency of facts to put purchaser upon inquiry as to fraudulent purpose of grantor.

Effect of failure to make inquiry upon running of Statute of Limitations.

Cited in *Norris v. Haggin*, 28 Fed. 275; *Miller v. Ash*, 156 Cal. 544, 105 Pac. 600; *O'Dell v. Burnham*, 61 Wis. 562, 21 N. W. 635,—holding that statute of limitation does not begin to run against equitable relief on ground of fraud until aggrieved party has discovered facts or has information of such nature as would impress person with belief that fraud had been committed.

Knowledge of agent or solicitor as notice to principal.

Cited in *Dennis v. Atlanta Nat. Bldg. & L. Asso.* 69 C. C. A. 315, 136 Fed. 539, holding that where person who negotiated loan for loan association in city where loan was made was, representative of association, notice to him of facts affecting title of land mortgaged was notice to association; *School Dist. v. De Weese*, 100 Fed. 705, holding that bank was not chargeable with notice of fraud of cashier, while he is acting as agent of school district in converting bonds of district to his own use; *Bank of Overton v. Thompson*, 56 C. C. A. 554, 118 Fed. 798, holding that notice to agent is not notice to principal where in transaction he acts not only for his principal, but also for himself, and his interests or conduct is such as to render certain that he would not make disclosure; *Wilson v. Pauly*, 18 C. C. A. 475, 37 U. S. App. 642, 72 Fed. 129, on the knowledge of an officer of the bank as charging bank with notice; *Graves v. Henderson*, 8 Grant, Ch. (U. C.) 1, on the client as charged with constructive notice of the solicitor's knowledge; *Willes v. Greenhill*, 29 Beav. 376, on the notice to one trustee of encumbrances as notice to all; *Watson v. Sutro*, 86 Cal. 500, 24 Pac. 172 (dissenting opinion), on agent's knowledge of an unrecorded deed as constructive notice to the client; *Graham v. British Canadian Loan & Invest. Co.* 12 Manitoba L. Rep. 244, holding that the principal was charged with the notice the agent had that a breach of trust was being committed or what he would have found if he had pursued his inquiries far enough; *Smyth v. Oliver*, 31 Ala. 39, holding that notice to agent is notice to principal; *Clarke v. Ingram*, 107 Ga. 565, 33 S. E. 802, holding that if notice comes to agent, in shape of knowledge of circumstances which should put him upon inquiry, princi-

pal will by implication be charged with notice as though he had been personally cognizant of facts learned by agent; *Barnes v. Trenton Gaslight Co.* 27 N. J. Eq. 37; *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362,—holding that corporation making purchase from its president is not chargeable with his knowledge of infirmities in his title to property; *Field v. Campbell*, 164 Ind. 389, 108 Am. St. Rep. 301, 72 N. E. 260, holding that notice to agent is notice to principal; *Exchange Bank v. Nebraska Underwriters Ins. Co.* 84 Neb. 110, 133 Am. St. Rep. 614, 120 N. W. 1010, holding that notice to agent is not notice to principal, where agent acts for another party in transaction where knowledge is obtained; *Clark v. Marshall*, 62 N. H. 498, holding that incorporated person, buying property for full value of one who is his agent, is not chargeable with notice of grantor's undisclosed purpose to hinder and delay his creditors; *Fishkill Sav. Inst. v. National Bank*, 80 N. Y. 162, 36 Am. Rep. 595, holding that bank will be deemed to have knowledge of facts relating to bank's business although because of negligent performance of duties by directors, conversion of paper by cashier took place; *Weed v. Smull*, 3 Sandf. Ch. 273, holding that notice to solicitor is ordinarily equivalent to notice to client; *Westervelt v. Haff*, 2 Sandf. Ch. 98, holding that notice to solicitor of subsequent mortgagee, who prepares securities in his behalf, is notice to client; *Cowan v. Withrow*, 111 N. C. 306, 16 S. E. 397, holding that actual notice to agent of unregistered deed, is actual notice to principal under Acts of 1885; *Melms v. Pabst Brewing Co.* 93 Wis. 153, 57 Am. St. Rep. 899, 66 N. W. 518, holding that attorney's knowledge acquired in previous transaction is not to be imputed to subsequent clients, where it would be breach of professional confidence to communicate it to them; *Gibbons v. Wilson*, 17 Ont. App. Rep. 1, on notice to solicitor as notice to client in relation to title to property; *Gilleland v. Wadsworth*, 23 Grant. Ch. (U. C.) 547, holding that where an attorney assigned a mortgage payable to him to another, and, in order to effect an exchange of property for clients drew up a conveyance to a fourth person, a conveyance by the fourth person to the mortgagor, and a mortgage on the newly acquired property in his favor, the knowledge of the attorney that the mortgage on the land acquired had been assigned could not be imputed to such fourth person; *Majoribanks v. Hovenden*, Dru. 11, 6 Ir. Eq. Rep. 238, holding that the second mortgagee was affected with notice of the first mortgage in consequence of his having engaged the mortgagor as his solicitor; *Fuller v. Bennett*, 2 Hare, 394, 12 L. J. Ch. N. S. 355, 7 Jur. 1056, holding that where the same solicitors acted all through and they had notice of an agreement to mortgage, the mortgagee of a subsequent owner was charged with notice of the previous agreement to mortgage.

Cited in *Weeks*, Attys. 2d ed. 490, on notice to solicitor as notice to client.

Distinguished in *Gibbons v. Wilson*, 17 Ont. App. Rep. 1, holding that where the solicitor acting for a creditor, obtained for the debtor on the security of a chattel mortgage a loan from another client who was ignorant of the purposes for which the money was required, he was not chargeable with the solicitors' knowledge of the debtor's insolvency; *Leys v. McPherson*, 17 U. C. C. P. 266, holding that where the husband was the solicitor the wife was not charged with his knowledge in executing to her a bill of sale in fraud of creditors; *Agra Bank v. Barry*, 21 E. R. C. 784, L. R. 7 H. L. 135, holding that the nonproduction of title deeds to the solicitor to prepare a mortgage, will not of itself be evidence of fraud so as to affect the interests of his client; *Kettlewell v. Watson*, L. R. 21 Ch. Div. 685, 51 L. J. Ch. N. S. 281, 46 L. T. N. S. 83, 30 Week. Rep. 402, holding that where subpurchasers told the original purchasers to manage

the transaction for him, he was charged with knowledge of a lien for unpaid purchase money.

— **Concealed fraud of the solicitor or agent.**

Cited in *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552, holding that client is not chargeable with knowledge of attorney who has been guilty of actual fraud contrived and carried on for his own benefit; *Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co.* 22 Blatchf. 221, 20 Fed. 699, holding that a corporation is not charged with notice of facts known to an officer or agent in a transaction between himself, and the corporation, where he is acting for himself; *First Nat. Bank v. Tompkins*, 6 C. C. A. 237, 13 U. S. App. 300, 57 Fed. 20, holding that a bank is not chargeable with constructive notice because of the knowledge of the president, that the full purchase price has not been paid; *Thomson-Houston Electric Co. v. Capitol Electric Co.* 12 C. C. A. 643, 22 U. S. App. 669, 65 Fed. 341, holding that the principal is not chargeable with notice to the agent where the agent was engaged in an attempt to deceive and defraud him; *Mullens v. Bank of Monroe*, 75 Iowa, 689, 37 N. W. 954; *Knoblock v. Germania Sav. Bank*, 50 S. C. 259, 27 S. E. 962, holding that knowledge of agent while engaged in fraud for his own benefit, in principal is not in anyway participant, cannot be imputed to principal; *Allen v. South Boston R. Co.* 150 Mass. 200, 5 L.R.A. 716, 15 Am. St. Rep. 185, 22 N. E. 917, holding that fraud of treasurer of corporation who was also broker, while acting as broker in sale of fraudulent stock of corporation, could not be imputed to his customer; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282, holding that notice to agent will not be imputed to principal where it appears that communication of knowledge to principal would defeat agent's fraudulent scheme; *State Sav. Bank v. Montgomery*, 126 Mich. 327, 85 N. W. 879, holding that knowledge of bank cashier's fraud in falsely representing to maker and indorser of certain notes for his accommodation, discounted by him at bank, that such notes were renewals of other notes which had been paid, cannot be imputed to bank; *Houghton v. Todd*, 58 Neb. 360, 78 N. W. 634; *Hickman v. Green*, 123 Mo. 165, 29 L.R.A. 39, 27 S. W. 440, holding that notice to agent is not notice to principal where agent is shown to be in collusion with third person to defraud principal; *Cameron v. Hutchison*, 16 Grant, Ch. (U. C.) 526, holding that where such motives exist in the mind of the solicitor as would be sufficient with ordinary men to induce them to withhold information from the client, the presumption is that he did so, and the client will not be charged with notice; *Ogilvie v. Jeaffreson*, 2 Giff. 353, 6 Jur. N. S. 970, 8 Week. Rep. 745, on the doctrine of constructive notice as affected by the concealed fraud of the solicitor; *Thompson v. Cartwright*, 33 Beav. 178, 33 L. J. Ch. N. S. 234, 9 Jur. N. S. 1215, 9 L. T. N. S. 431, 12 Week. Rep. 116, holding that the client is treated as having constructive notice of all the facts which come to the knowledge of his solicitor, unless it is the fraud of the solicitor himself that is concealed; *Ex parte Oriental Commercial Bank*, L. R. 5 Ch. 358, 39 L. J. Ch. N. S. 588, 22 L. T. N. S. 422, 18 Week. Rep. 474, holding that where the manager of one bank purchased bills of exchange with the money of the bank, and afterward sold them to another company as his own, the latter company was not charged with notice, because of the agents' fraud; *Waldy v. Gray*, L. R. 20 Eq. 238, 44 L. J. Ch. N. S. 394, 32 L. T. N. S. 531, 23 Week. Rep. 676, holding that where the party was solicitor for another in the obtaining of a mortgage, wherein he was mortgagee, and he fraudulently certified to the title so as to enable his

client to secure money in the bank with the deeds, the bank was not charged with notice of the first mortgage.

Cited in 2 Devlin, Deeds, 3d ed. 1426, on nonaffecting of principal with notice to agent where agent guilty of fraud.

Distinguished in *Hewitt v. Loosemore*, 21 L. J. Ch. N. S. 69, 9 Hare, 449, 15 Jur. 1097, holding that where the mortgagor was a solicitor and acted alone in preparing a mortgage, a legal mortgagee will not be charged with notice of a prior equitable mortgage, in the absence of other circumstances: *Atterbury v. Wallis*, 25 L. J. Ch. N. S. 792, 8 De G. M. & G. 454, 2 Jur. N. S. 1177, 4 Week. Rep. 734, holding that where a solicitor took a mortgage of an equity of redemption and submortgaged, and later acted as a solicitor for himself and the first mortgagee, in giving a mortgage, the new mortgagee was charged with notice of the submortgage: *Rolland v. Hart*, L. R. 6 Ch. 678, 40 L. J. Ch. N. S. 701, 25 L. T. N. S. 191, 19 Week. Rep. 962, holding that where the solicitor first obtained a loan from one party and then for another, for the same mortgagor, the second mortgagee was charged with notice of the first mortgage though unrecorded.

Effect of fraud inducing execution of contract.

Cited in notes in 36 L.R.A.(N.S.) 539, 540, on right, as against subsequent bona fide purchaser, to avoid deed because of deception as to contents or character of paper signed: 6 E. R. C. 228, on effect of fraud inducing execution of contract.

Cited in 1 Beach, Trusts, 479, on constructive trust arising from misrepresentation.

Undue influence of solicitor.

Cited in *Dea v. Tarehin*, New Foundl. Rep. (1897-1903) 187, on the question of undue influence in the signing of a deed.

Invalidity of deed for fraud in inducing signature.

Cited in *Hunter v. Walters*, L. R. 11 Eq. 294, 24 L. T. N. S. 276, L. R. 7 Ch. 75, 41 L. J. Ch. N. S. 175, 25 L. T. N. S. 765, 20 Week. Rep. 218, on the invalidity of a deed for fraud in inducing party to sign it.

Cited in note in 6 E. R. C. 228, on effect of fraud inducing execution of contract.

Rights of bona fide purchaser without notice.

Cited in *De Mares v. Gilpin*, 15 Coio. 76, 24 Pac. 568, holding that in resulting trust not evidenced by anything of record, innocent bona fide purchaser without notice will take estate divested of trust.

Burden of proof as to notice.

Cited in *Calais S. B. Co. v. Scudder*, 2 Black, 372, 17 L. ed. 282, holding that burden of proof rests upon equitable owner, to show that purchaser had notice of his rights in due time.

Waiver of informality in execution of instrument by knowledge of defective power to execute instrument.

Cited in *Com. v. Roark*, 116 Ky. 396, 76 S. W. 140, holding that cosureties having knowledge of defective power of surety to execute bail bond, will be deemed to have waived any informality in execution by cosurety.

Effect of receipt under seal.

Cited in 1 Beach, Contr. 466, on effect of receipt under seal.

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